

19 Monay Place

Mark. L. L. 1911

one witness enough to prove
each single fact in a case
Lees v. Macdonald 1893
3 White 468.

as stated on p. 139

Police Questions p. 31.

Isabella Loring 2 bup 2
Lewis & Blair 3 bup 16

Previous Threats Kennedy 5 Adam 3.

<u>Laws Insanity</u>	{ Milne 4 bup	301
<u>D.J.C. Inglis</u>	{ Brown 5 bup	215

SCOTTISH
LAW OF EVIDENCE

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DIGEST
OF THE
SCOTTISH
LAW OF EVIDENCE

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SECOND EDITION

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THIS EDITION
IS GRATEFULLY DEDICATED TO
THE HON. LORD TRAYNER, LL.D.,
ONE OF THE SENATORS OF THE
COLLEGE OF JUSTICE.

PREFACE TO SECOND EDITION.

THIS Edition has been carefully revised, the law brought down to date, and the Index considerably extended ; but the original numbering of the paragraphs has not been altered.

To several critics and professional friends I am indebted for many valuable emendations and suggestions, all of which I have gratefully adopted so far as practicable.

PREFACE TO FIRST EDITION

(1882).

THIS volume is intended to supply practising lawyers, as well as students and others, with a concise and convenient exposition of the Law of Evidence, a selection of the principal cases relating to it, and an abstract of the Evidence Acts and of many other statutes more or less directly bearing on the subject.

To some extent the work is based upon that of Mr. Dickson, while the arrangement in its main features is the same as that of Sir J. F. Stephen's digest of the English law of evidence; but much in Mr. Dickson's work that is now obsolete, or that seemed superfluous or hardly within the domain of evidence, has been omitted from the present volume and a good deal of new matter has been added. As the work is not intended to be a scientifically constructed code, but is rather designed for everyday practical purposes, the use of formal and technical phraseology has been as far as possible avoided.

Although, like Sir J. F. Stephen's digest of evidence, the work is divided into three parts, treating respectively of Relevancy and Admissibility, of Proof, and of the Production and Effect of Evidence, the boundaries between these well-nigh inseparable pro-

vinces have not been always strictly observed, and it has in some cases seemed convenient to treat of two or more of them together.

The more important general rules of evidence, which will be readily understood and easily remembered, are printed in larger type ; but for facility of reference the whole of the matter, including these leading rules, is divided into sections.

For much valuable assistance I am indebted to the kindness of my friends, Mr. W. D. Thorburn and Mr. P. J. Hamilton-Grierson, advocates. The former suggested several important emendations, and the latter aided in collating and verifying the references.

As Mr. Dickson's work is very frequently referred to, it is briefly denoted by the initial D, with the number of the section.

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DIGEST

OF THE

SCOTTISH LAW OF EVIDENCE.

CHAPTER I.

DEFINITION OF TERMS.

1. *Judge*.—Every one authorised to take evidence either by law or by the consent of parties. Definition of 'judges;'

2. *Court*.—Every tribunal in Scotland presided over by a judge, including also the House of Lords. 'courts;'

3. *Fact*.—The existence of any physical or mental condition, or the occurrence of any event perceptible by the senses. and 'facts.'

A 'Question of Fact' is a question or dispute as to alleged facts, the existence of which must be ascertained by the leading of evidence, and as to the inferences to be drawn from them ; while a 'Question of Law' is a dispute as to the rule of law applicable in ascertained circumstances. Question of fact. Question of law.

The 'Facts in Issue' are those regarding which the parties to a cause are at variance and require to lead evidence. Facts in issue.

4. *Relevancy*.—One fact is relevant to another when in the ordinary course of events it proves, or con- Relevancy defined.

CH. I. § 4. tributes to prove, or renders probable the existence or the non-existence of that other.

Facts when deemed relevant ; Facts, or rather averments, of which the relevancy is not apparent, are sometimes 'deemed relevant' and admitted to proof, as they may tend to throw indirect light on the disputed facts, and thus turn out to be truly relevant. Conversely, facts when deemed irrelevant. apparently or truly relevant are sometimes 'deemed irrelevant,' and evidence of them is excluded as incompetent, on account of the remoteness of their bearing on the facts in issue. The degrees of relevancy are necessarily very numerous, and the point at which relevancy fades into irrelevancy is not always easily determined.

When case is relevant. A 'Relevant Case' is one in which the conclusion that a legal remedy should be afforded, or a penalty imposed, flows necessarily from the premises or facts stated.

Documents ; 5. *Document*.—This term includes all written or printed matter, whether formal or informal.

when probative. A 'Probative Document' is one which, in consequence of its being holograph, or tested, or prepared by responsible public officials, does not require to be proved genuine by extrinsic evidence.

Deeds. The term 'Deed' is usually applied to formal holograph or tested documents.

Evidence. 6. *Evidence*.—Evidence is of two kinds: (1) 'Oral Evidence,' or statements made by witnesses in court, under a legal sanction, relating to the facts to be investigated; and (2) 'Documentary Evidence,' or writings relating to these facts, produced for the inspection of the judge.

Real evidence. To these is sometimes added 'Real Evidence,' or the evidence afforded by objects relating to the facts in issue; but such evidence can only be adduced as an adjunct of oral or documentary. The term 'real evidence' is sometimes used to denote 'signifi-

cant facts,' or inferences from events rather than from statements. The objects which constitute documentary and real evidence, when lodged in court, are termed 'Productions.' CH. I. § 6.
Productions.

'Evidence,' in a narrower sense, also means admissible evidence, or competent evidence of facts which are relevant or deemed relevant, while statements or documents which are inadmissible are characterised as 'not evidence.' 'Evidence' in narrower sense.
'Not evidence.'

'Parole Evidence,' a term which in the narrower sense is synonymous with oral evidence, is frequently used in contradistinction to 'writ or oath of party,' in which case it includes every other kind of competent evidence, whether oral, documentary, or real (*cf.* § 7). Parole evidence in different senses.

'Hearsay Evidence,' which is generally inadmissible (*inf.* §§ 35-59), signifies evidence of statements made by a person who is not called as a witness, or in circumstances which the Court has no means of ascertaining; and the term is sometimes applied to statements contained in a book or improbative document of which the writer is not called. Thus, if the witness A is asked what B, who is not a witness, said to him on a certain occasion, his answer would be 'hearsay evidence,' and is generally excluded: because the indirect evidence afforded by a statement made in circumstances which cannot be fully ascertained, and reported by a person who may have misunderstood it, is justly deemed untrustworthy. On the other hand, if B's statement, though he be not called as a witness, has been made in presence of one of the parties to the cause, it becomes a fact in the case; A's evidence of it ceases to be 'hearsay,' in the legal sense, and will be admitted: because the Court is in a position to ascertain the circumstances in which the statement was made, and to test its accuracy and its bearings (*inf.* § 17). Again, if B's statement was of the nature of an ejaculation or expression of strong feeling, uttered in connection with the *res gestæ* (*inf.* §§ 13-20), it may constitute a fact in the case which may be competently proved by A. Lastly, if B is called as a witness, A's account of any conversation with him, so far as relevant, is not regarded as 'hearsay,' and is admissible, because capable of being tested by the examination of B himself. Hearsay.

'Primary Evidence' is the evidence afforded by a probative document produced in Court, or by one proved or admitted to Primary evidence.

- CH. I. § 6. be genuine ; and the term is sometimes applied to direct as opposed to hearsay evidence.
- Secondary. 'Secondary Evidence' is the evidence afforded by copies of documents proved to have been correctly made, or by oral testimony regarding the contents of the originals. The term is also applied to hearsay evidence. To the category of secondary evidence belong also maps, plans, diagrams, models, photographs, etc., which as a rule are not evidence unless proved accurate by oral testimony.
- Primâ facie.* '*Primâ facie* evidence' may be defined as evidence sufficiently strong to raise a legal presumption (*inf.* §§ 152, 153). The possession of moveables, for example, is usually *primâ facie* evidence that the possessor is also the owner, and the burden of proving that he is not the owner lies on the party seeking to dispossess him (§ 156). Conversely, if the goods have been very recently stolen, their possession affords *primâ facie* evidence that the possessor is a thief or a resetter, and he will be required to prove that he came by them lawfully (§§ 15, 156).
- Direct. Among other terms may be mentioned 'Direct Evidence,' which means the testimony of witnesses that they themselves have observed and are aware of the facts in issue. The popular
- Circumstantial. term 'Circumstantial Evidence' really includes all 'indirect evidence,' or the testimony of witnesses regarding facts more or less remotely relevant to the facts in issue. When a crime has been committed, a certain amount of direct evidence is required to prove that fact, but the fact that a certain person committed it is often proved exclusively by indirect evidence.
- Evidence when admissible ;
- when inadmissible.
- Evidence is always 'admissible' when relating to facts relevant or deemed relevant to those in issue, and such pertinent facts may generally be proved *prout de jure* (§ 7). But in certain cases a fact can only be competently proved by formal writ (§ 98), or by the informal writ or the oath of the party against whose interest it is averred (ch. xv.), or by the writ or oath of that party followed by *rei interventus* (§§ 110, 141-2). In such cases relevant parole evidence is deemed irrelevant, and is therefore inadmissible.
- Effect of evidence varies.
- When admissible evidence has been adduced, its 'effect' falls to be weighed and determined by the Court. It may give rise to a slender inference only, or it may raise a presumption of

law and thus establish a *prima facie* case, or it may be declared by law to be conclusive and incapable of being contradicted (see, *e.g.*, 19 & 20 Vict. c. 58, §§ 17, 44; 25 & 26 Vict. c. 89, § 106, etc., both cited in Table of Statutes, *inf.*). CH. I. § 6.

7. *Proof*.—This term signifies either (1) ‘Conclusive Proof,’ or the amount of evidence requisite to enable a judge to hold a fact established (*cf.* § 8); or, in a wider sense, the (2) ‘Leading of Evidence’ in civil cases tried by a judge without a jury. Proof, when conclusive.

Proof in wider sense.

‘Proof at Large,’ or ‘proof *prout de jure*,’ is the leading of every kind of competent evidence, and is synonymous with parole evidence in the wider sense. Proof at large, or *prout de jure*.

‘Proof by Writ or Oath’ is the restricted mode used in certain cases of proving a party’s liability by his own writ or oath (see ch. xv., *inf.*). Proof by writ or oath.

8. *Presumption*.—(1.) A ‘*Præsumptio juris et de jure*’ is an inference which judges are bound to draw from certain facts, and which may not be contradicted. (2.) A ‘*Præsumptio juris*,’ or a ‘presumption of law,’ is also an inference which judges must draw from certain facts, unless the inference is rebutted by competent evidence. (3.) A ‘*Præsumptio judicis vel hominis*,’ or ‘presumption of fact,’ signifies the inference naturally, though not necessarily, deducible from certain facts, and is of course capable of being rebutted. Præsumptio juris et de jure.

Præsumptio juris, or legal presumption in proper sense.

Presumption of fact.

The second of these only is a presumption in the proper legal sense, the first referring to a state of matters which law holds to be conclusively proved, and the third being merely an inference regarding which no rule exists (*cf.* §§ 152-160, *inf.*). There is no sharp line of demarcation between a presumption of law and a presumption of fact: if the former be weak, it may be First and third not properly presumptions.

C.H. i. § 8.

easily rebutted; if the latter be strong, it will require strong evidence to rebut it (see, *e.g.*, filiation cases, § 155, *inf.*). The distinction must not, however, be lost sight of, particularly in jury trials, in which the important question may arise whether the judge should direct the jury that they may, or that they must, draw a certain inference from certain facts.

Admission is assent to opponent's averment, or a statement against interest.

9. *Admissions*.—An 'admission,' in one sense, signifies the consent of one party to hold as true an averment made by his opponent. In a wider sense the term is also applied to any statement made by a party either directly or indirectly against his interest.

Confession in criminal cases.

A 'confession' is an admission or statement against interest by a person accused of a crime or offence. In the narrower sense it usually means an admission of guilt.

PART I.

RELEVANCY AND ADMISSIBILITY
OF EVIDENCE.

CHAPTER II.

OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE.

EVIDENCE IS ADMISSIBLE AS TO FACTS IN ISSUE, AND
AS TO FACTS RELEVANT TO THOSE IN ISSUE.

10. WHEN disputed facts form the subject of inquiry in Court, the parties to the cause may adduce evidence regarding the facts in issue and regarding any other facts relevant or deemed relevant to the facts in issue. But the judge may exclude evidence of relevant facts which bear too remotely upon the case, and he is bound to exclude evidence of facts which law deems irrelevant.^a

^{1.}
CH. II. § 10.

11. In order to be admitted to proof, a party's averments must either be relevant to the issue or have some indirect bearing upon it. Illustrations of this rule might easily be multiplied. In a trial for murder, for example, the facts in

Illustrations
of rule.

(a) D. 17-21; Steph. Art. 2; *M'Laren v. Buik*, 20 June 1829, 7 S. 780, and cases in §§ 11-90, *inf.*

I.

- CH. II. § II. issue may be, (1) whether a certain wound caused the death of the deceased, (2) whether the prisoner inflicted the wound, and if so, (3) whether he was justified in inflicting it, or was insane when he did so. To these questions, or facts in issue, innumerable other averments may be relevant and admitted to proof: —(1) that wilful neglect or grossly unskilful treatment was the immediate cause of the death; that, although the deceased was mortally wounded with a knife, the immediate cause of his death was poison;^a—(2) that the prisoner was observed near the scene of the murder about the time when it occurred; that his knife corresponds in shape to the wound inflicted on the deceased; that a wound inflicted about the same time by the prisoner on a third person is of similar character; that the prisoner was ten miles distant from the scene of the murder at the time when it was committed, or half an hour before or after it was committed;^b—(3) that the prisoner's life was in danger from the violence of the deceased at the time when the latter was stabbed; that the prisoner had recently escaped from a lunatic asylum.^c
- Relevancy in case of murder. What immediately caused death? Facts relevant to show guilt or innocence.
- Pleas of self-defence and insanity.
- Degrees of relevancy.
- Pleas of self-defence and provocation.
- As already observed (§ 4), the relevancy of evidence, or rather the relevancy of averments admitted to proof, varies greatly in degree, and it may fade away and be ultimately extinguished by mere lapse of time.^d Thus when a prisoner on his trial for murder pleads that his life was endangered by the violence of the deceased, the value of the defence depends on the time when the alleged violence was committed. If the prisoner's life was thus endangered at the moment when he struck the fatal blow, his plea is relevant, and the homicide was justifiable; if the danger was over, but the prisoner, while smarting under provocation, or apprehensive of renewed violence, struck the fatal blow, his defence may be deemed relevant or irrelevant according to the peculiar circumstances of the case, and the crime may or may not be reduced to culpable homicide; but if the danger had entirely ceased before the blow was struck, the defence is irrelevant, and the case is one of murder.^e

(a) *Flinn & Brennan*, 1848, J. Sh. 9; *Williamson*, 1866, 5 Irv. 326; 1 *Hume* 181-6; 1 *Al.* 71-2, 146-52.

(b) D. 252. (c) 1 *Hume*, 247; 1 *Al.* 7, 20, 21. (d) D. 18.

(e) *Alison*, 1838, 2 Sw. 167; *Shiels*, 1846, Ark. 171.

12. In civil cases also the degrees of relevancy are very various. While, generally, evidence of facts which have no apparent bearing on the issue is inadmissible, such facts are frequently admitted to proof, as they may turn out to be relevant.^a Cases in which the relevancy of a fact is quite obvious require no comment.

CH. II. § 12.

Relevant facts in civil cases.

There are many cases, however, in which difficulty arises with regard to facts bordering on irrelevancy. When a party's sanity is in question, the fact that hereditary insanity exists in his family seems to be truly relevant, but is deemed irrelevant owing to the remoteness of the inference to be drawn from it, and owing also to the presumption that exists in favour of sanity.^b

Insanity of relations deemed irrelevant.

The fact, in a question of paternity, that the child is like its alleged father has been held irrelevant in Scotland,^c but evidence of an unusually striking resemblance should perhaps be admitted as relevant.^d

Family likeness deemed irrelevant.

If, on the other hand, the resemblance consist in some palpable peculiarity, as that the child and several members of the alleged mother's family were born with six toes on each foot, or that the child is a mulatto, and the alleged father a negro, it will be admitted to proof as relevant.^e

The fact that a party acted in a certain way on one occasion is deemed irrelevant for the purpose of showing that he would act in the same way on a similar occasion, but is admissible for the purpose of showing his motive (§ 30), or indicating design or system (§ 31). In civil as in criminal cases, the relevancy of one fact to another may depend on their proximity in point of time. Thus, if an assault is committed, or an insult uttered, long after the provocation alleged to have given rise to it, the provocation will generally be deemed irrelevant (*cf.* § 11).^f

Party's previous conduct deemed irrelevant.

Lapse of time impairs relevancy.

(a) *L. Pr. Inglis in Surtees v. Wotherspoon*, 20 Jan. 1872, 10 M. 358.

(b) *Dingwall*, 1867, 5 Irv. 466; *Laing or Paterson*, 1872, 2 Coup. 222.

(c) *Rutledge v. Carruthers*, 20 Jan. 1810, F.C.

(d) *Douglas Peerage Case*, 1789, 2 Pat. Ap. 143, 147; *Fraser, Par. & Child*, 2d ed. 18.

(e) *Laird*, 1848, Ark. 471; *Sinclair v. M'Arthur*, see *Fraser, P. & C.* 19.

(f) *Hyslop v. Staig*, 1816, and *Bannerman v. Fenwicks*, 1 Mur. 21, 252.

I.

CH. II. § 12.

Relevancy
often not
clear.

In the above cases, and in those mentioned in Chapter iii., it is often difficult to draw the line between relevancy and irrelevancy. It need hardly be said that, if a fact is absolutely irrelevant, the parties to a cause will rarely seek to prove it.

RES GESTÆ DEEMED RELEVANT.

13. All facts forming part of the transaction in issue or closely connected with it, and statements accompanying or explaining these facts, are relevant or deemed relevant.^a

Res gestæ de-
fined.

14. The somewhat vague though convenient expression *res gestæ* signifies all the facts surrounding and immediately connected with the transaction or event which forms the subject of inquiry; and in a wider sense it also embraces statements made about the time of the transaction in issue, and relating to that transaction, by any of the parties engaged in it, or by others in their presence, although such statements may be of doubtful relevancy.^b When statements form part of the transaction in issue it is difficult to exclude them as irrelevant, and if they have immediately preceded or followed, or have accompanied the transaction, they may tend to explain facts that would otherwise be unintelligible. On the other hand, statements made some time after the transaction by a person not called as a witness are generally inadmissible as being mere hearsay.^c

Facts closely
connected
with those in
issue.

15. Closely connected with an issue of uttering forged notes or base coin, for example, is the fact that other forged notes or base coins are found in possession of the accused, or that he has previously attempted to utter such notes or coins; and such facts, which if unexplained betray guilty knowledge, may accordingly be proved if libelled on.^d On the same ground, in

(a) D. 36, 83-109, 1381-2, 1480-4; Steph. Art. 3, 7, 8, 9; 2 Hume, 406, note a; 2 Al. 517.

(b) Cf. Chap. iv.

(c) L. Young in *Greer v. Stirlingsh. Road Trs.*, 7 July 1882, 9 R. 1076.

(d) 1 Al. 416, 419, 455; 1 Hume, 156, note 2; 24 & 25 Vict. c. 99, §§ 10, 11.

I.

cases of murder in particular, numerous circumjacent facts, the relevancy of which, taken singly, may not be apparent, are admitted to proof. Evidence of such facts is popularly termed 'circumstantial,' in contradistinction to evidence bearing directly on the facts in issue.^a Among circumstances from which, if unexplained or falsely explained, guilty knowledge of a theft may be inferred, is the discovery of the stolen goods in possession of the accused shortly after the commission of the crime.^b The fact that an accused person has absconded is, when taken by itself, a circumstance of comparatively little weight;^c and the same may be said of the fact that he has made false statements regarding his conduct about the time of the transaction in issue.^d

16. When an act is admitted to proof as relevant, statements preceding, accompanying, or following it, made by or to the person alleged to have committed it, are also admissible so far as necessary to explain the act. Thus, in a trial for murder, expressions used by the prisoner shortly before the commission of the crime, indicative of ill-will towards the deceased, may be proved.^e Guilty knowledge on the part of the accused is also frequently betrayed by statements made by him after the commission of the crime.^f So also, when a prisoner is charged with using seditious expressions, similar expressions occurring in the same speech may be proved for the purpose of showing the unlawfulness of his purpose.^g Statements or explanations volunteered by a prisoner at the time of his apprehension, as well as those made by him about the time when the offence was committed, are constantly admitted to proof.^h

17. When a party's conduct is in issue, not only his own statements, but those of other persons made to him or in his presence, may be relevant for the purpose of showing his demeanour on the occasion;ⁱ but the fact that he was silent when statements were made in his hearing to which he was not

CH. II. § 15.
'Circumstantial evidence.'

Statements in connection with facts.

Statements made in party's hearing.

(a) D. 251-64; *sup.* § 6.

(b) D. 256, 334; Macd., 2nd. ed., 516; *inf.* § 156.

(c) D. 274-5.

(d) D. 276.

(e) *Millar*, 1837, 1 Sw. 486; *Salt*, 1860, 3 Irv. 549.

(f) *Reg. v. Mannings*, 1849, noted in D. 286.

(g) *Grant*, 1848, J. Sh. 53.

(h) *Laing*, 1871, 2 Coup. 23.

(i) D. 91, 1480-4.

I.

CH. II. § 17.

De recenti
statements
by injured
party relevant.

But greater
latitude
allowed in
cases of rape.

Terms of
complaint
deemed irrelevant.

Facts showing
motive,
preparation,
&c.

Subsequent
conduct.

bound or expected to reply is irrelevant. A party cannot be bound by statements not made in his presence.^a

18. When a crime or delict has been committed, the fact that the injured person complained of the injury *de recenti* is relevant ;^b but a statement made *ex intervallo* is deemed irrelevant, on the ground that it is less likely to afford a true account of the transaction.^c

While in many cases an interval of a few hours has been held sufficient to exclude evidence of a complaint, much greater latitude is allowed in trials for rape. In such cases, not only in the interests of the sufferer, who may at first have been reluctant to complain, or may have found no one to confide in, but for the purpose of testing her veracity, it is usual to admit evidence of statements made by her several days and even weeks after the commission of the alleged crime.^d Evidence of the precise terms of the complaint has been held inadmissible,^e but no good reason for this restriction has ever been assigned.^f

19. Closely akin to acts or statements forming part of the transaction in issue are facts indicative of motive, preparation, and opportunity for it, and the subsequent conduct of parties concerned in it.^g In most cases the motive for a fraudulent or criminal act is obvious and requires no proof, but less obvious motives, such as revenge, or the desire to conceal a previous crime, must generally be proved. Thus, in a case of assault or murder, the motive of the accused may be gathered from expressions of ill-will, threats, or an angry demeanour towards the person injured or murdered.^h So also the existence of criminal intent may be inferred from preparations made to

(a) *Longworth v. Yelverton*, 4 March 1862, 24 D. 696.

(b) D. 95-8.

(c) *Moran*, 1836, 1 Sw. 231; *A. B. v. C. D.*, 23 Dec. 1848, 11 D. 289.

(d) *M'Millan*, 1833, Bell's Notes, 288; *Murray*, 1866, 5 Irv. 232.

(e) *Hall v. Otto*, 1818, 1 Mur. 444; *Robertson v. Barclay*, 1828, 4 Mur. 530.

(f) See L. Pr. Boyle and L. Jeffrey in *A. B. v. C. D. sup.*

(g) D. 252, 266-77; Steph. Art. 7.

(h) *Woods*, 1839, 2 Sw. 323; *Cromarty*, 1843, 1 Br. 588.

commit a crime, and a consciousness of guilt from attempts to conceal it after it has been committed. If to these indications be added proof of an opportunity of committing the crime, a moderate amount of direct evidence will probably complete the chain of evidence. Foremost among such indications of guilt are attempts to fabricate or suppress evidence. Criminals have also betrayed themselves by showing agitation on being asked an apparently simple question. Indications of almost all these different kinds were present in the Mannings' case,^a and in that of Palmer.^b

Suppression of evidence.

Agitation of guilty party.

20. Somewhat more remote from the *res gesta*, but still more or less obviously relevant to them, are facts which are necessary to explain or introduce relevant facts.^c Of such facts there are necessarily many different kinds. They may support or rebut an inference arising from a relevant fact, or tend to prove or disprove the identity of a person or thing connected with the case, or establish the time or place where an event happened, or show the validity or invalidity of a document produced, or explain the motives, intentions, and conduct of parties concerned. A familiar illustration of the admissibility of facts of this kind occurs in reductions of wills on the ground of facility, in which the feelings, intentions, and demeanour of the testator towards his relations, and towards the persons who are said to have influenced him unduly, form the subject of investigation.^d So, too, in actions of damages for slander, the position of the parties and their surroundings must often be inquired into before the alleged slander can be understood. An expression, for example, which would be slanderous if deliberate, may lose that character if uttered in the course of a quarrel.^e In consistorial cases also, and particularly in declarators of marriage, it is often necessary to prove the conduct and conversation of the parties, and the terms on which they lived.^f So, too, in an action

Facts explaining relevant facts.

Explanatory facts in reduction of wills ;

in actions of damages for slander

in consistorial cases ;

(a) Noted in D. 286.

(b) Sep. rep. 1856.

(c) Steph. Art. 9.

(d) D. 19.

(e) *Mackintosh v. Squair*, 1868, 40 Jur. 561.

(f) *Longworth v. Yelverton*, 4 March 1862, 24 D. 696 ; rev. 28 July, 1864, 2 M., H. L., 49 ; *Robertson v. Steuart*, 27 Feb. 1874, 1 R. 532 ; rev. 7 June 1875, 2 R., H. L., 80 ; *Maloy v. Macadam*, 9 Jan. 1885, 12 R. 431.

I.

CH. II. § 20.

of divorce for adultery, condoned acts may be proved for the purpose of throwing light on those which form the ground of action;^a and indecent conduct towards persons other than those with whom adultery is libelled is also admissible to proof.^b In an action of filiation familiarities between the parties three years after the birth of the child has also been held relevant for the purpose of showing the relations subsisting between them.^c Again, in a trial for forgery, it is competent to prove that genuine deeds of the same date are executed in a different style from the deed in issue, and to adduce historical evidence for the purpose of detecting anachronisms in the forged deed.^d Lastly, in a case of mobbing and rioting, the cries of persons in the mob other than the parties accused of the offence are relevant to explain the nature of the transaction.^e Facts of this kind are closely akin to those mentioned in the next paragraph.

in trials for
forgery ;

and in cases
of mobbing
and rioting.

ACTS OF CONSPIRATORS.

21. When *prima facie* evidence exists that several persons have conspired to commit a crime or delict, whatever is said or done by one of them in furtherance of their common purpose is deemed relevant against the others.^f

22. This rule belongs to a somewhat different category from the last. Here the *res gestæ* do not necessarily cluster round a single transaction, but usually consist of many distinct acts and statements, each of which is relevant against other conspirators who have taken no part in them. The reason is that each conspirator makes the others his agents for the execution of their common design. On the other hand, statements re-

Res gestæ
may consist
of many dis-
tinct acts.

Each con-
spirator
agent for the
other.

(a) *Collins v. Collins*, 18 Feb. 1884, 11 R., H. L., 19.

(b) *Whyte v. Whyte*, 15 March 1884, 11 R. 710.

(c) *Scott v. Dawson*, 2 Feb. 1884, 11 R. 518.

(d) *Humphreys*, 1839, Rep. by Swinton, 88-94, 119-20, &c.

(e) 2 Hume, 407, note ; *R. v. Lord G. Gordon*, 1781, 21 St. Tr. 514.

(f) D. 93 ; Steph. Art. 4 ; 2 Hume, 406, note a.

garding the conspiracy, but not in furtherance of it, are relevant only against the party who makes them and those of his associates who concur with him in making it.^a Even where no express conspiracy or combination exists a number of persons by taking part in the same reckless or criminal conduct make each other responsible for the consequences.^b In other words, as soon as it is established that the accused persons were 'art and part' engaged in the same transaction, the acts of each are relevant against the others; and the mere fact of being a passive spectator of a crime may constitute the onlooker an aider and abettor, and involve him in the same penalty as the perpetrator.^c

CH. II. § 22.

Criminal conduct of accused relevant against abettors.

Mere spectator may be involved as 'art and part.'

PROOF OF RIGHTS OF PROPERTY AND OF CUSTOMS.

23. When a right of property or a custom is in issue, every fact which shows or tends to show how the right was exercised or the custom observed is deemed relevant.^d

24. When the construction of a deed and the rights of parties under it, or the existence or extent of an alleged servitude or a public right of way, or the existence or observance of an alleged custom are in issue, the mode in which the parties interested have interpreted and exercised their rights often affords the only solution of the question. In the case of heritable rights this process of interpretation must generally have extended throughout the full period of the long prescription, while in the case of mercantile and other customs a much shorter period suffices. All acts which aid such interpretation are deemed relevant. Taken singly, they are clearly irrelevant; for the fact that a thing was done cannot prove the existence of a right

Rights interpreted by usage.

Single acts deemed relevant when

(a) *Cumming*, 1848, J. Sh. 17; 2 Al. 612-3; see also *R. v. Hardy*, 1794, 24 St. Tr. 451-3.

(b) *L. Neaves in Barbier, &c.*, 1867, 5 Irv. 482; *Orr, &c.*, 1856, 2 Irv. 502.

(c) *Kerr, &c.*, 1871, 2 Coup. 334.

(d) D. 20, 224-7, 237, 332; Steph. Art. 5, 6.

I.

CH. II. § 24.

building up
custom.Expressions
in deeds in-
terpreted by
usage.Certain rights
inferred from
usage alone.Relevant
facts in right
of way cases.Official per-
sons pre-
sumed duly
appointed.

to do it. Collectively, however, they may become relevant ; for the fact that their repetition was permitted by parties having an adverse interest raises a presumption that they were done in accordance with a recognised right or custom.

25. On these grounds it is competent to interpret obscure or ambiguous expressions in deeds by means of the possession or usage which has followed on them.^a 'Fishings,' for example, may be interpreted by usage as including salmon-fishing ;^b and the extent to which 'parts and pertinents' have actually been possessed often affords the only mode of ascertaining the meaning of the expression.^c In such cases every exercise of the right and every act of possession, and every act of opposition by parties having an adverse interest, are deemed relevant.

26. When the alleged right rests merely on implied grant, its existence can usually be inferred solely from the fact that it has long been exercised without opposition. Where, for example, the public claim a right of way across private property, as the right is generally inferred from usage alone, every fact tending to prove or disprove the usage is necessarily deemed relevant. Thus, the proprietor's title-deeds, old maps and plans of the district, local histories, the fact that certain persons used the disputed path without challenge for a long period, the fact that other persons were turned back, the fact that a gate placed across the road was frequently found locked, and the fact that a shorter road between the extremities of the path in question already exists, are all admitted as relevant to the issue.^d On similar grounds the fact that a person acted in an official capacity is deemed relevant to the question whether he was duly appointed to the office.^e

(a) *L. Curriehill in L. Adv. v. Sinclair*, 21 June 1865, 3 M. 981, 994.

(b) *Stuart v. M'Barnet*, 21 July 1868, 6 M., 11. L., 123 ; *L. Adv. v. Cathcart*, 19 May 1871, 9 M. 744.

(c) *D. 224-7 ; Stewart's Trs. v. Robertson*, 6 Jan. 1874, 1 R. 334.

(d) *D. 332-3 ; Duncan v. Lees*, 13 Dec. 1870, 9 M. 274 ; *Macintosh v. Moir*, 8 Feb. 1871, 9 M. 574 ; *Glentilt case*, 12 Dec. 1849, 12 D. 328 ; aff. 3 June 1852, 1 Macq. 65.

(e) *Steph. Art. 13 ; Roscoe, N. Pr.*, 15th ed., 42 ; see also *D.*, 2d ed., 16, note 24.

27. So also, when a custom of trade or other usage is in issue, it is frequently inferred from a number of isolated facts, the relevancy of which is only apparent when they are taken collectively.^a In many cases facts may be relevant or deemed relevant, although their connection with those actually in issue is so remote that they closely resemble the unconnected facts which form the subject of the next chapter.

CH. II. § 27.
Customs inferred from facts taken collectively.

(a) D. 20, 128, 237, 293 ; *M. of Tweeddale v. Brown*, 1821, 2 Mur. 565, 569 ; *Mackenzie v. Dunlop*, 1856, 3 Macq. 22.

CHAPTER III.

FACTS SIMILAR TO THOSE IN ISSUE, BUT UNCONNECTED WITH THEM, GENERALLY IRRELEVANT.

SIMILARITY NOT NECESSARILY RELEVANCY.

I.
CH. iii. § 28.
—

28. FACTS similar to those in issue, but not connected with them in any of the ways already pointed out,^a are either irrelevant or deemed irrelevant, except in the cases mentioned below.^b

*Res inter
alios.*

Such facts
either
deemed
irrelevant
owing to
remoteness,

29. This rule is sometimes conveniently, though far from accurately, expressed by the maxim, *res inter alios acta alteri non nocet*, which means that the acts of parties unconnected with the cause, and also those of the parties to the cause on an occasion unconnected with it, are irrelevant. In some cases, no doubt, the fact that a person acted in a certain way on one occasion may render it probable that another person, and more probable that he himself, will act in the same way on another occasion; but the inference is so slender and untrustworthy that the fact is generally deemed irrelevant. On this ground it is deemed irrelevant in a case of theft or reset that the prisoner is 'habit and repute' a thief or resetter, although the fact may be proved as an aggravation if duly libelled.^c Again, in an action of divorce, the co-defender's intimacy with persons other than the defender, though a remote inference might be

(a) *Sup.* §§ 10-27.

(b) *Inf.* §§ 30-4; D. 18, 20, 21; Steph. Art. 10.

(c) *Burns v. Hart*, 1856, 2 Irv. 571.

drawn from it, is deemed irrelevant. Many facts are manifestly irrelevant, such as, in a criminal trial, the fact that other persons have committed similar crimes, or, in a declarator of marriage, the fact that the pursuer was intimate with other men before the alleged marriage.^a The following paragraphs mention the chief cases in which unconnected facts are deemed relevant to each other. Such facts may either be treated of as exceptions to the general rule just stated (§ 28), or they may be regarded as being truly, though not apparently, connected facts, and therefore relevant to each other under the rules laid down in Chapter ii.

CH. iii. § 29.
or manifestly irrelevant.

Exceptions to rule may be regarded as examples of rules in Ch. ii.

ACTS INDICATING MOTIVE, INTENTION, MALICE, ETC.

30. When a person's conduct is directly or indirectly in issue, his conduct on a similar occasion, and even extrinsic circumstances, are frequently relevant for the purpose of proving the motives or intentions with which he acted on the occasion in issue.^b

31. While it is generally deemed irrelevant to prove a party's conduct on one occasion for the purpose of showing the probability of his acting in the same way on another, such evidence is deemed relevant if it tends to explain the motives which actuated him on the occasion in issue. On this ground it is declared by statute that, in a charge of uttering base coin, the possession of other base coins, and attempts to utter them, are relevant to prove guilty knowledge on the part of the prisoner.^c When a person is bitten by a dog and sues the owner for damages, the fact that other persons had previously been bitten, and had complained to the owner, is relevant for

Previous conduct deemed relevant to show motive.

In action for bite by a dog, previous complaints relevant.

(a) *Macdonald v. Macdonald*, 2 June 1863, 1 M. 854; but see *Surtees v. Wotherspoon*, 20 Jan. 1872, 10 M. 355.

(b) D. 18, 34, 88, 90, 1377; Steph. Art. II.

(c) Act 24 & 25 Vict. c. 99, §§ 10, 11.

I.

CH. III. § 31. the purpose of showing the owner's knowledge of the dog's disposition.^a

Relevant defences in cases of slander, false imprisonment, &c.

Again, in an action of damages for slander, the fact that the slander complained of was uttered by other persons besides the defender is relevant to the plea of probable cause in mitigation of damages.^b In an action of damages for wrongous imprisonment, the defender may show probable cause by proving that the pursuer was previously convicted for an offence similar to that for which he was wrongously apprehended.^c In an action of assythment by children for the loss of their father, the fact that he was a person of bad character and lived separate from them has been held relevant to the question of damage;^d and in an action of damages against a man for adultery committed with the pursuer's wife, the pursuer's immoral conduct during the marriage may likewise be relevantly proved in mitigation.^e So also, in a declarator of marriage by promise *subsequente copulâ*, the previous conduct of the woman is relevant in order to show the character of the connection following the promise;^f and, in an action of divorce, indecent conduct towards persons other than those with whom adultery is libelled is relevant to prove 'corrupt inclinations and endeavours.'^g Lastly, when a party's knowledge of a certain event is in issue, the fact that it was notified in the *Gazette* is deemed relevant, but does not of itself raise a presumption that he knew of the event.^h

Relevancy of previous conduct;

of notice in *Gazette* to prove knowledge.

UNCONNECTED FACTS RELEVANT WHEN SHOWING SYSTEM.

32. When facts unconnected with those in issue tend to prove a system or design, or course of busi-

(a) *M'Intyre v. Carmichael*, 18 Feb. 1870, 8 M. 570; *Renwick v. Rotberg*, 2 July 1875, 2 R. 855.

(b) *Kingan v. Watson*, 1829, 4 Mur. 489; *Gibsons v. Marr*, 1823, 3 Mur. 261.

(c) *Nimmo v. Stewart*, 1832, 10 S. 844.

(d) *Brash v. Steele*, 27 Feb. 1845, 7 D. 539.

(e) Fraser, H. & W., 2d. ed., 1205.

(f) *Surtees v. Wotherspoon*, 20 Jan. 1872, 10 M. 355.

(g) *Whyte v. Whyte*, 15 March 1884, 11 R. 710.

(h) D. 1059; *Harratt v. Wise*, 1820, 9 B. & C. 712.

ness, in accordance with which those in issue probably occurred, they are relevant to the issue.^a CH. iii. § 32.

33. When a number of occurrences similar to that in issue have taken place, although each is apparently irrelevant, yet when all are considered together they may bear manifest traces of uniformity of purpose or design, and thus throw light upon the fact in issue. This rule may therefore be regarded as a corollary of the last, and is illustrated by similar cases. Thus, in a question of the forgery of a bill, it has been held relevant that other bills were forged in similar circumstances.^b Both by statute and at common law, the previous tendering or uttering of base coin is relevant to a charge of uttering, as showing design or guilty knowledge.^c In an English case, in which a woman was indicted for poisoning her husband, the fact that she had administered the same poison subsequently to his three sons was held relevant to the issue;^d and in a trial in England for falsification of certain accounts, it was held relevant that the prisoner had previously falsified them repeatedly to his own advantage.^e So also, in an English case of fire-raising, it was deemed relevant that fires had occurred in two other houses in which the prisoner had lived, and that he had received compensation from two different insurance companies.^f In such cases as these the *res inter alios acta* becomes relevant by repetition.

34. On similar grounds, when the question is whether a certain act was done, it is relevant to prove a systematic course of business in accordance with which it would naturally have been done.^g This rule is sometimes stated as a presumption *omnia rite et sollemniter acta*.^h Thus, the fact that letters are posted regularly by a business firm raises the presumption that a cer-

Facts irrelevant when taken singly may show system.

Facts showing system relevant in criminal trials.

Existence of course of business relevant to show that act was done in accordance with it.

(a) D. 6, 18, 34-6, 293, 1414; Steph. Art. 12, 13.

(b) *Troup v. Begg*, 22 Dec. 1838, 1 D. 356.

(c) 1 Al. 455; 24 & 25 Vict. c. 99, § 10.

(d) *R. v. Geering*, 1849, 18 L. J., M. C. 215.

(e) *R. v. Richardson*, 1860, 2 F. & F. 343.

(f) *R. v. Gray*, 1866, 4 F. & F. 1102.

(g) D. 6; Steph. 13.

(h) D. 293.

I.

CH. iii. § 34.

tain letter written by the firm was duly posted,^a and when parties have systematically balanced their business accounts for a series of years, it is presumable that the accounts embrace all their transactions connected with the business in question.^b The existence of the system is, therefore, a fact relevant to, but not conclusive of, the question whether the act was done, or the letter posted, or the account accurately balanced. The present rule may also be described as complementary to that stated in §§ 23-27 with regard to proof of custom. The custom having been proved, the presumption is in favour of its observance.

(a) *Mackenzie v. Dott*, 18 July 1861, 23 D. 1310.

(b) D. 6, 293; *Maclaren v. Wilson*, 22 Feb. 1862, 24 D. 577.

CHAPTER IV.

HEARSAY AND OTHER SECONDARY EVIDENCE.

HEARSAY EVIDENCE INADMISSIBLE.

I.

35. THE terms of a statement made by a person not called as a witness are, with the following exceptions,^a irrelevant or deemed irrelevant to the facts in issue,^b and are therefore inadmissible.

CH. iv. § 35.

36. The rule that 'hearsay is not evidence' signifies that a witness is generally precluded from repeating statements which have been made by persons not called as witnesses, unless they form part of the *res gestæ* actually in issue;^c and the rule is strictly enforced when the statement is one of opinion and not of fact.^d The admission of such statements would be inconsistent with the general rule which requires the best evidence, and which rejects secondary evidence whenever primary is obtainable.^e Thus, to take a simple illustration, if a witness says that his brother, who is not a witness, told him that he saw a crime committed, the statement of the brother thus reported, though obviously relevant, is not evidence, because it is not a statement made by the observer himself when examined

'Hearsay not evidence;' meaning of the rule.

Best evidence always required.

(a) *Inf.* §§ 37-57.

(b) D. 83-109, 1375-85; Stair, 4, 43, 15; Steph. Art. 14.

(c) *Sup.* § 6, 'hearsay evidence,' and §§ 16-18.

(d) L. Pr. Inglis in *Apthorpe v. Edin. Tram. Co.*, 13 Dec. 1883, 10 R. 351.

(e) A good illustration of the rejection of secondary evidence where primary is procurable is afforded by *Grieve v. Grieve*, 22 May 1885, in which L. Fraser refused to allow a photograph to be shown to a witness for the purpose of identifying a person resident in this country.

I.

CH. IV. § 36.

Fact that statement was made often admissible, though its terms are excluded.

Statement may be proved when it is a fact in issue.

on oath, it is not liable to be tested by cross-examination, it may have been misunderstood by the hearer, and it does not form part of the transaction in issue. On the other hand, the witness would be allowed to mention, by way of explanation, the fact that a certain statement made to him by his brother induced him to act in a certain way, although he is not allowed to repeat the terms of the statement. Again, if one of the facts in issue be whether a certain statement was made, the fact may of course be proved like any other fact in the case,^a but the truth or falsehood of the statement must be proved by extrinsic evidence. The principal cases in which statements are regarded as forming part of the *res gestæ* in issue have already been mentioned.^b Such statements do not fall under the term 'hearsay,' in the legal sense of the term; or, in other words, what a witness 'heard said' is not necessarily 'hearsay.'^c

EXCEPTIONS TO RULE THAT HEARSAY IS NOT EVIDENCE.

37. Hearsay or secondary evidence of facts relevant to the issue is admissible in cases where it is the best procurable.^d

Hearsay admitted in identification of prisoners.

38. In criminal cases hearsay evidence is often admitted for the purpose of proving that a witness identified the prisoner soon after his apprehension,^e as the witness might otherwise be unable to identify the prisoner after a lapse of several weeks or months, and the most important evidence in the case would thus be lost. The secondary evidence is analogous to the labelling of productions, which the witness would often be unable to identify but for the signed labels attached to them. The statutory rule that, when a witness has been asked whether on a specified occasion he made a different statement from that which he has made in the witness-box, other witnesses may be called to prove the previous statement,^f has been cited as an

Statutory rule as to different

(a) *Sup.* § 10.

(b) *Sup.* §§ 16-18.

(c) *Sup.* § 6.

(d) See notes to § 35; *Steph. Chap. iv.*

(e) *Wight*, 1836, 1 Sw. 47; *Stewart*, 1855, 2 Irv. 179.

(f) Act 15 Vict. c. 27, § 3; *Gall v. Gall*, 23 Nov. 1870, 9 M. 177.

exception to the exclusion of hearsay evidence ;^a but it is truly an exception to the rule that the evidence of a witness cannot generally be contradicted or corroborated by his extrajudicial statements. For the evidence thus admitted is not admitted for the purpose of proving or disproving the truth of the previous statement, but merely to prove the fact of the witness's inconsistency.^b

CH. iv. § 38.

statement by witness on previous occasion.

As a general rule it is incompetent to contradict a witness by proof of what he said in precognition.^c As the above statute, however, does not exclude previous statements made in precognition, it is thought that they ought in very special circumstances to be admitted, *quantum valeant*, there being sometimes no other available means of discrediting a dishonest witness.^d

Competency of contradicting witness by proof of precognition.

39. Evidence of statements relevant to the issue, made by a person who would have been a competent witness, but has died before the trial, is always admissible (unless the statements have been made in precognition ; see *inf.*),^e being the best obtainable. Such statements may be proved either orally or by means of documents written by the deceased.^f On the same ground, hearsay evidence of statements by a person who has since become insane would probably be admitted ;^g but the statements of persons merely absent from the country are inadmissible.^h In such cases there must be at least *prima facie* evidence of the death (or the insanity) of the person who made the statement.ⁱ Evidence of statements by deceased persons regarding relationships as to which they had special

Evidence of statements by deceased persons admissible.

Death must be proved.

Hearsay in questions of pedigree.

(a) D. 101.

(b) *Inf.* § 189.

(c) *O'Donnel*, 1855, 2 Irv. 236 ; *Emslie v. Alexander*, 20 Dec. 1862, 1 M. 209.

(d) *Inch v. Inch*, 7 June 1856, 18 D. 997 ; *Robertson*, 1873, 2 Coup. 495.

(e) D. 102-8 ; Bell's Pr. § 2259 ; *Lovat Peerage*, 1885, 10 L. R., H. L., 763.

(f) *Lauderdale Peerage*, 1885, 10 L. R., H. L., 692.

(g) *Harvey*, 1835, Bell's Notes, 292 ; *Ewing v. E. Mar*, 22 Dec. 1851, 14 D. 314.

(h) *Cavalari*, 1854, 1 Irv. 564 ; *Rouatt*, 1852, 1 Irv. 79.

(i) *Christian v. Kennedy*, 1818, 1 Mur. 424 ; *Miller v. Moffat*, 1820, 2 Mur. 325.

I.

CH. IV. § 39. means of knowledge is admissible.^a On the other hand, the statements of a deceased person made in precognition are inadmissible, as likely to have been biassed in favour of the party who precognosced him ;^b but exceptions to the rule have been admitted in special circumstances.^c

Precognition of deceased persons generally inadmissible.

Hearsay of hearsay inadmissible. Evidence that a person since deceased made a statement as to what he had been told by some one else is deemed irrelevant, because too remote.^d

Depositions more trustworthy. Far more trustworthy is secondary evidence of a deposition judicially emitted in a former case between the same parties and regarding the same matter ;^e but if it has been emitted with regard to different circumstances, or in a cause between different parties, it will probably be excluded,^f except, perhaps, in questions of pedigree and ancient boundaries.^g Affidavits, certificates, or other written statements by deceased or absent persons, are generally inadmissible ; but in questions of ancient date they will usually be admitted, *quantum valeant*, provided they appear to be genuine and unbiassed.^h So, too, letters by deceased persons, who would have been competent witnesses, will be admitted if they had special knowledge of the facts in issue, and if the circumstances in which the letters were written are known.ⁱ Such letters, and even copies of them, written *ante litem motam*, have been held admissible in cases of pedigree.^j

Affidavits inadmissible.

(a) *Alexander v. Off. of State*, 30 March 1868, 6 M., H. L., 54 ; *Macpherson v. Reid's Trs.* 1876, 4 R. 133 ; 1877, 4 R., H. L., 87.

(b) *M'Intosh*, 1838, 2 Sw. 103 ; *Ormond, &c.*, 1848, Ark. 483 ; *Macdonald v. Union Bank*, 29 March 1864, 2 M. 963 ; *Graham v. Western Bank*, 8 March 1865, 3 M. 617.

(c) *Wards*, 1859, 1 Coup. 186 ; *Peterson*, 1874, 2 Coup. 557.

(d) *Lovat Peerage*, 1885, 10 L. R., H. L., 763.

(e) *Bell v. Reid*, 19 July 1862, 24 D. 1428.

(f) L. Pr. M'Neill in *Geils v. Geils*, 10 Feb. 1855, 17 D. 404 ; see also § 57, *inf.*

(g) L. Moncreiff in *Gordon v. Grant*, 12 Nov. 1850, 13 D. 1.

(h) Cf. § 213, *inf.*

(i) See *M'Alister v. M'Alister*, 12 Dec. 1833, 12 S. 198.

(j) *Crawford & Lindsay Peerage*, 11 Aug. 1848, 13 D., II. L., 32 ; *Lauderdale Peerage*, 1885, 10 L. R., H. L., 692.

HEARSAY EVIDENCE OF EXTRAJUDICIAL ADMISSIONS
WHEN RELEVANT.

40. Extrajudicial admissions by a party to the cause may be proved, if relevant to the facts in issue.^a

41. Statements by a party may be made either in his own favour or against his interest. Those of the former class are excluded, however relevant ;^b those of the latter, usually termed admissions,^c may be proved. Evidence of a party's statements in his own favour is inadmissible, because they are likely to have been biassed and untrustworthy.^d A party may not, for example, found upon statements in his private books,^e though he may found on entries in his business-books, if regularly kept.^f As already mentioned, however, the statements of a party, although in his own favour, may be proved if they form part of the *res gestæ* in issue,^g or for the purpose of rendering a conversation or other statements intelligible,^h or for the purpose of testing the state of his mind.ⁱ Again, if a party expressly or tacitly assents to statements made by his opponent in his own favour, these statements are thus rendered relevant.^j

42. The probative value of admissions varies greatly according to circumstances. Judicial admissions, whether made on record, or by counsel orally in court, or by a prisoner at the bar when interrogated as to his guilt, are conclusive in the

Statement by party in his own favour inadmissible ;

unless part of *res gestæ*, or to show state of mind ;

but relevant if assented to by opponent.

Different kinds of admissions and their value.

Judicial admissions conclusive.

(a) D. 1443-54 ; Steph. Art. 15-20.

(b) D. 1373-85 ; *Lovat Peerage*, 1885, 10 L. R., H. L., 763.

(c) *Sup.* § 9.

(d) *Hunter v. Dodds*, 12 July 1832, 10 S. 833.

(e) *Smith v. Mitchell*, 1826, 5 S. 32 ; 1830, 4 W. & S. 47.

(f) *Inf.* § 76.

(g) *Sup.* §§ 13-20.

(h) *Stevenson v. Kyle*, 31 May 1849, 11 D. 1086 ; *Longworth v. Yelverton*, 4 March 1862, 24 D. 696.

(i) *Mackintosh v. Fraser*, 19 March 1859, 21 D. 783.

(j) *Sup.* § 17 ; *inf.* §§ 48-9 ; D. 1379.

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Extrajudicial admissions weighty if formal and deliberate.

Written and unqualified admissions well-nigh conclusive.

Oral admissions may be misunderstood, or be made in error.

Extrajudicial admissions relevant against party in civil cases; may be made in conversation, correspondence, or precognition.

Admissions in attempting compromise are without prejudice.

cause in which they are made.^a The rules regarding such admissions and their effect belong to the province of procedure. The extrajudicial admissions to which the present sections refer may possess a semi-judicial or quasi-official character, like the declaration of a prisoner,^b or a set of regularly kept business-books,^c in which case they afford strong *prima facie* evidence of the fact admitted. Extrajudicial admissions, when written and unqualified, are also entitled to great weight, though not necessarily conclusive; if oral, they are always more or less untrustworthy, as the persons who heard them made may have misunderstood their meaning; and if qualified, their effect may be entirely neutralised. Lastly, it must be added that erroneous admissions may be made under misapprehension, and that false confessions are frequently made by persons labouring under excitement or insanity.^d

43. Extrajudicial admissions by a party to a civil action, unless made under undue influence, are relevant, though not conclusive, against him, and may competently be proved. This rule is applied to statements made in conversation,^e or in correspondence,^f or in a different action.^g Such admissions are of special value in consistorial cases, as they are less likely to be collusive than judicial admissions, and in such cases they do not require very strong corroboration.^h Admissions made by a party in attempting to compromise an action are not relevant against him, as they are made on the implied understanding that they are 'without prejudice,' *i.e.* not to be used if the attempt fails. Admissions extorted by artifice are discountenanced, though not incompetent evidence,ⁱ while those obtained by

(a) L. J. Clk. Hope in *Cairns v. Marianski*, 30 March and 19 July 1850, 12 D. 919, 1286.

(b) *Inf.* § 50.

(c) *Inf.* § 76.

(d) D. 1489-98.

(e) *Fraser v. Wilson*, 28 March, 1842, 4 D. 1171.

(f) *Edmonstone v. Hamilton*, 18 Jan. 1843, 5 D. 414.

(g) *Morrison v. Somerville*, 21 Dec. 1860, 23 D. 232.

(h) *Fullerton v. Fullerton*, 20 June 1873, 11 M. 720; *Fraser, H. & W.* 2d ed. 1170.

(i) *Robb v. Campbell*, 1824, 3 S. 301.

means of illegal compulsion would probably be held inept.^a CH. iv. § 43.
With regard to admissions in criminal cases, see §§ 46, 51.

EXTRAJUDICIAL ADMISSIONS BY ONE PARTY ON BEHALF
OF ANOTHER.

44. Admissions made by an agent, so far as duly authorised to make them, are relevant against his principal, and may be proved.^b

45. This rule is susceptible of many applications. Admissions by an agent bind his principal when made in connection with the business intrusted to him,^c and particularly when he is in charge of the whole affairs of the principal.^d A partner is the duly authorised agent of his co-partners, and can bind them by admissions within the limits of the business of the partnership.^e

Admissions by agent bind principal.

Partner's admissions bind co-partners.

In like manner admissions made by a cedent before intimation of the assignation has been made to the debtor are binding on the assignee, but not those made afterwards, as the cedent is then divested of all interest in the claim assigned.^f For a similar reason a principal cannot bind his cautioner by admissions made after the constitution of the cautionary obligation.^g Nor can the indorsee of a bill prior to maturity be affected by an admission made by the previous holder that it was not granted for an onerous consideration.^h A party may expressly agree to be bound by the statement of his factor,ⁱ or by that of a third

Admission by cedent binds assignee before intimation.

Cautioner not bound by admission of principal, nor indorsee of bill by that of previous holder.

(a) L. Ellenborough in *Stockfleth v. De Tastet*, 1814, 4 Camp. 11.

(b) D. 1465-77; Steph. Art. 15-19.

(c) *Mackintosh v. Pitcairn*, 16 Dec. 1851, 14 D. 187; *National Exchange Co. v. Drew*, 31 May 1850, 12 D. 950; Steph. Art. 17.

(d) L. Pr. M'Neill in *M'Gregor v. M'Gregor*, 27 June 1860, 22 D. 1264.

(e) 2 Bell's Com. 618.

(f) Stair, 3, 1, 18; Ersk. 3, 5, 9 & 10; 3, 6, 16.

(g) *Hunter v. Curson*, 1822, 3 Mur. 233.

(h) *Jameson v. Grahame*, 23 Nov. 1832, 11 S. 80.

(i) *Cooper v. Hamilton*, 20 Feb. 1824, 2 S. 728; 1826, 2 W. & S. 59.

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CH. iv. § 45. party. On the other hand, the fact that a number of parties are bound together by a common interest does not render the admission of one binding on the others,^a unless concert or conspiracy among them be proved.^b

HEARSAY EVIDENCE OF CONFESSIONS IN CRIMINAL
CASES ADMISSIBLE.

46. Voluntary confessions of crime, or statements of facts relevant to the crime in issue, are relevant against the persons who make them.^c

Confession must not have been extorted by person in authority.

Confession elicited by private party admissible.

47. The confession must have been voluntary, and must not have been extorted by any promise, threat, or inducement proceeding from a magistrate, the prosecutor, or other person in authority, from a constable, or from a private party in presence and with the assent of the prosecutor or an official representing him.^d Not only is the trustworthiness of confessions thus improperly elicited considered doubtful,^e but their admission would obviously be inconsistent with fair play.

If, on the other hand, the inducements proceed from a private individual, whether the person injured by the crime or not, the confession thereby elicited will be deemed voluntary.^f Confessions elicited by private parties by means of deception, but not if elicited by officials,^g and those obtained from an intoxicated

(a) *Duncan v. Forbes*, 4 March 1831, 9 S. 540; *McIndoe v. Frame*, 1824, 3 S. 295.

(b) *L. Gillies in Campbell v. Macfarlane*, 25 Feb. 1840, 2 D. 663; cf. §§ 20, 21.

(c) D. 1455-64; Steph. Art. 21-4; 2 Hume, 333; 2 Al. 535, 579, 581; Macd. 2d ed. 493-500, 515.

(d) *Mahler & Berrenhard*, 1857, 2 Irv. 634; *L. J. Clk. Inglis in Hay*, 1858, 3 Irv. 181; *Graham*, 1876, 3 Coup. 217; *Robertson*, 1853, 1 Irv. 219.

(e) *R. v. Warwickshall*, 1783, 1 Leach, 263.

(f) *Honeyman & Smith*, 1815, 2 Hume, 335; Macd. 2d ed. 258.

(g) *Kerr v. Mackay*, 1853, 1 Irv. 213.

person, would probably also be admitted.^a Those elicited in consequence of the advice of a clergyman would probably also be deemed voluntary;^b but confessions of a strictly religious character should, it is thought, be held privileged.^c So also statements made by a prisoner when apprehended and charged with a crime are relevant against him.^d Statements voluntarily made by a prisoner in conversation may be proved by any one who heard them;^e but such evidence is received with great caution, and is generally rejected if obtained through the medium of officials,^f unless the prisoner has been distinctly warned that his statement may be used against him.^g Discoveries made in consequence of confessions which have been improperly elicited are admissible in England, although the confessions themselves are excluded, except so far as necessary to explain the discoveries;^h but it is doubtful whether they would be admitted in Scotland.ⁱ

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Statement by prisoner on apprehension, or in conversation admissible.

Discoveries through extorted confession admissible in England.

Exclamations by a person when asleep would probably be admitted if they led to any discovery implicating the utterer, but are obviously untrustworthy unless so corroborated.^j Lastly, it may be added that, while a judicial confession is conclusive against a prisoner, and a confession in his declaration affords a very strong presumption against him, his extrajudicial confession requires to be corroborated by proof of the *corpus delicti* and of circumstances connecting the prisoner with the crime.^k

(a) Steph. Art. 24.

(b) *R. v. Gilham*, 1828, 1 Moody, 186.

(c) *Inf.* § 179, 182; *Ross*, 1859, 3 *Irv.* 434; 2 *Al.* 540.

(d) *Laing*, 1871, 2 *Coup.* 23; *L. Cowan in Lewis v. Blair*, 1858, 3 *Irv.* 16.

(e) *Johnston*, 1845, 2 *Br.* 401.

(f) *Robertson*, 1853, 1 *Irv.* 219; *Hendry, &c.*, 1857, 2 *Irv.* 618; *Beaton*, 1856, 2 *Irv.* 457.

(g) *Proudfoot*, 1882, 4 *Coup.* 590.

(h) Steph. Art. 22.

(i) *Graham*, 1876, 3 *Coup.* 217; *Watt*, 1834, *Bell's Notes*, 244.

(j) *Emond*, 1830, *Bell's Notes*, 243.

(k) 2 *Hume*, 333; 2 *Al.* 582; *Macd.* 2d ed. 515; *cf.* § 93, *inf.*

Johnston *Craig*
v. *Dickson* 1460

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IMPLIED EXTRAJUDICIAL ADMISSIONS AND
CONFESSIONS.

48. Admissions and confessions necessarily or fairly implied from a party's conversation or conduct are revelant against him.^a

Extrajudicial admissions implied from conversation and conduct.

Admissions implied from taciturnity or *mora*.

Qualified admissions.

49. Extrajudicial admissions and confessions may of course be implied from the conversation or conduct of one of the parties to a cause, or from that of any one entitled to make admissions on his behalf. If implied from the party's conversation, they obviously fall within the exceptions to the exclusion of hearsay evidence; but if inferred from his conduct or his silence, they belong rather to the doctrine of acquiescence.^b Admissions are frequently inferred from the fact that a party remains silent when a statement to his prejudice is made in his hearing.^c For a similar reason, a party to whom an account has been rendered cannot after a considerable interval, and especially if partial payments have been made, impugn any of the items.^d So also, payment of a debt may be held to be admitted if no claim for it has been made for a long period, provided the presumption from *mora* be corroborated by other facts.^e A qualified admission cannot be founded on apart from its qualifications; or in other words, a party cannot both approve and reprobate his opponent's statements.^f But such an admission may be founded on if the qualification be extrinsic to it or separable from it.^g

The question how far admissions can be implied from a party's pleadings does not belong to the law of evidence.

(a) D. 1479-86; Steph. Art. 102.

(b) Cf. D. 1379.

(c) L. Gillies in *Campbell v. Macfarlane*, 25 Feb. 1840, 2 D. 663; *Lewis v. Blair*, 1858, 3 Irv. 16.

(d) *Smith v. Maxwell*, 25 Jan. 1833, 11 S. 323.

(e) *Ryrie v. Ryrie*, 26 June 1840, 2 D. 1210; *Robson v. Bywater*, 19 March 1870, 8 M. 757.

(f) D. 1487-8; *Bilsborough v. Bosomworth*, 5 Dec. 1861, 24 D. 109.

(g) *Couper v. Young*, 28 Nov. 1849, 12 D. 190.

50. The declaration of a prisoner emitted before a magistrate is admissible as evidence against him, but not in his favour.^a

51. Admissions, express or implied, in the declaration of a prisoner, which, though committed to writing, also falls within the definition of hearsay evidence, are evidence against him but not in his favour, on the ground that a party's statements in his own favour are generally deemed irrelevant.^b The requisites of a declaration and the rules to be observed in taking it belong to works on criminal procedure.^c A confession of guilt in a prisoner's declaration, not being conclusive against him like a plea of 'guilty,' must be corroborated by circumstances of considerable suspicion.^d A prisoner's declaration is not admissible in his own favour or in that of any one else,^e though, if consistent with the defence, it may justly influence the jury in the prisoner's favour. The accuracy of a declaration, like that of other documents, may be impugned on the ground of irregularity or falsity. Declarations have accordingly been invalidated by the temporary absence of the magistrate in whose presence it bears to have been emitted,^f and by the fact that the prisoner was intoxicated or excited,^g or that a promise, threat, or recommendation was addressed to him by a public official.^h

Admissions in declaration relevant against prisoner.

Declaration inadmissible in favour of prisoner.

Declaration may be impugned.

ADMISSIONS IN ONE CAUSE HOW FAR RELEVANT IN ANOTHER.

52. Statements and declarations made by a party in one cause may generally be used against him in

(a) D. 1405-33; 2 Hume, 324; Bell's Notes, 239; 2 Al. 557; Macd. 2d ed. 510.

(b) D. 1375-85, 1391.

(c) Macd. 2d ed. 257-63, 436, 509; D. *sup.* (d) *Sup.* §§ 42, 47.

(e) *Macqueen & Robson*, 1832, 2 Al. 577.

(f) *Mahler & Berrenhard*, 1857, 2 Irv. 634; *M'Millan*, 1858, 3 Irv. 213.

(g) 2 Hume, 328; *Milne*, 1863, 4 Irv. 301.

(h) *Mahler*, *sup.*

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CH. IV. § 52. another; but while they may have been conclusive in the original cause, they may be explained or contradicted in the subsequent proceedings.^a

Admissions in one cause relevant in another.

Doubtful if prisoner's declaration admissible in civil action.

53. In accordance with this rule, admissions by a party in civil actions have frequently been held competent evidence against him in subsequent criminal proceedings;^b and, conversely, declarations in criminal cases have been held admissible in civil actions.^c At a later period, however, it was laid down that a prisoner's declaration is inadmissible in a civil action afterwards raised against him.^d If, however, the Crown, whose property the declaration is considered to be, does not oppose its production, there seems no good reason why it should not be admitted on the same ground as an extrajudicial statement.^e On the other hand, in accordance with the rule which requires the best procurable evidence to be adduced in each case, if the declaration itself be inadmissible, it is obviously incompetent to prove its contents by parole evidence.^f But if a prisoner pleads guilty to a criminal charge, it seems clear that his judicial confession is relevant, though not necessarily conclusive against him, in a subsequent civil action.^g

How far admission on record relevant in different case.

Express admissions relevant;

54. While the question how far admissions made on record are binding against the maker belongs properly to the rules of pleading or of procedure, such admissions fall within the category of hearsay in the wider sense when they are adduced as evidence in a subsequent cause. If statements or admissions of matters of fact have been unreservedly made by the express

(a) D. 1432-42; cf. Steph. Art. 32.

(b) *M'Iver v. M'Callum*, 1784, 2 Hume, 326; *Humphreys*, Bell's Notes, 240.

(c) Ivory's Ersk. 986, note 95; L. Ch. Comr. Adam in *Mackie v. Wight*, 1822, 3 Mur. 27.

(d) *Little v. Smith*, 9 Dec. 1845, 8 D. 265, and 17 Feb. 1847, 9 D. 737.

(e) *Sup.* §§ 40-3; see also D. 1436, note r.

(f) *Little v. Smith*, *sup.*

(g) *Grierson v. L. Zester*, 1541, M. 14,021; see also D. 1441-2.

sanction of a party in one action, they are relevant against him in a subsequent action.^a The record in one action is inadmissible in another where a different interest is at stake ;^b but if the second action be contingent to the first, or a continuation of it, the pleadings in the first will generally be held relevant in the second.^c

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but record inadmissible, unless second case contingent to first.

EVIDENCE IN ONE CAUSE WHEN ADMISSIBLE IN
ANOTHER.

55. Evidence given by a witness in one cause is generally inadmissible in any other, except when the witness has since died, or (probably also) when he is unavoidably prevented from attending.^d

56. As already stated,^e it is competent, in a proof or trial, to adduce secondary evidence of relevant statements made by deceased persons who would have been competent witnesses. The most trustworthy of such statements are those which have been made by the deceased in a previous case between the same parties, and the best evidence of these statements is afforded by the certified notes or record of the evidence.^f Even if the former evidence has been taken in a foreign country, it will be held relevant if it has been fairly and regularly taken.^g If the witness, though not dead, be insane, or if it be proved to the

Statements by witnesses since deceased may generally be proved.

(a) *Cairns v. Marianski*, 30 March 1850, 12 D. 919; 1851, 1 Macq. 212; *Smith v. Puller*, 1820, 2 Mur. 340, 342; *Ballentine v. Ross*, 1821, 2 Mur. 533.

(b) *Wight v. Liddel*, 1827, 4 Mur. 327.

(c) *Fraser v. Hill*, 4 March 1854, 16 D. 789; *Mollison's Trs. v. Crawford*, 11 June 1851, 13 D. 1075, 1087; *Burns v. Burns*, 20 July 1841, 3 D. 1273 (in which a question of fraud was involved); *contra*, *M'Ghie v. M'Kirdy*, 2 Jan. 1850, 12 D. 442.

(d) D. 1930-3; Steph. Art. 32.

(e) *Sup.* § 39.

(f) *Bell v. Reid*, 19 July 1862, 24 D. 1428; *Cleland v. Fleming*, 1847, 10 D. 40.

(g) L. Pr. M'Neill in *Geils v. Geils*, 10 Feb. 1855, 17 D. 397, 404.

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CH. iv. § 56. satisfaction of the Court that he cannot possibly attend, or be examined on commission, it is probable that his former evidence would also be admitted.^a But if the former evidence of the deceased has been emitted with reference to a different set of circumstances, or in a case between different parties, it will probably be held inadmissible, except perhaps in questions of pedigree and ancient boundaries.^b

If unavoidably absent, their evidence perhaps admissible.

Inadmissible if circumstances differ.

Evidence in case admissible in later stages.

Proof fixing debt evidence in action of relief.

57. While a fact may be held as conclusively proved in one action, it cannot generally be so held in a subsequent action, although between the same parties, and arising out of the same circumstances, until proved anew.^c If, however, one cause is truly a continuation of another, the evidence taken in the first is admissible in the second, except in trials by jury.^d So, too, when decree is pronounced against a debtor for a certain sum in one action, the proof on which it has proceeded (especially the evidence of witnesses who have died in the interval) will probably be admissible in an action of relief raised by the debtor.^e

WRITTEN STATEMENTS BY THIRD PARTIES GENERALLY
INADMISSIBLE.

58. Statements made by third parties in documents or books are generally deemed irrelevant, unless proved or admitted to be correct.^f

Written statements excluded, unless proved or admitted correct.

59. Statements made by third parties in documents or books are generally inadmissible on the same ground as hearsay evidence. However relevant to the issue they may be, they are rejected as untrustworthy when the circumstances in which

(a) *Sup.* § 39; Steph. Art. 32; *cf.* A. S. 16 Feb. 1841, and *Willox v. Farrell*, 26 Feb. 1848, 10 D. 807.

(b) L. Moncreiff in *Gordon v. Grant*, 12 Nov. 1850, 13 D. 1, 27; L. Fr. M'Neill in *Geils v. Geils*, *sup.*; and *cf.* § 39, *sup.*

(c) *Stevens v. Stevens*, 15 March 1882, 9 R. 730.

(d) *M'Indoe v. Lyon*, 7 Dec. 1826, F. C.; *Stewart v. Stewart*, 27 Feb. 1863, 1 M. 449; *Geils v. Geils*, 10 Feb. 1855, 17 D. 397; *cf.* *Fraser v. Hill*, 4 March 1854, 16 D. 789; Ersk. 4, 3, 36.

(e) *D. of Gordon v. Ly. H. Gordon*, 1748, M. 14,045.

(f) D. 1361-5; Steph. Art. 33-47.

they were made are unknown ; but they become admissible if sworn by the writer to be correct, or admitted correct by the party against whom they are adduced.^a Passages in scientific or other works are also inadmissible, although they become evidence on being adopted by witnesses examined in court.^b

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Statements in books inadmissible.

For the same reason, statements in a private diary are inadmissible ; but in certain civil cases they are admitted after the death of the writer, *quantum valeant*.^c So, too, in an action against a firm, the private books of one partner are not evidence against another, having been kept by the owner in a different *persona* from that in which he is sued.^d

Diaries and private books inadmissible.

In conformity with this rule (§ 58), statements made in private probative deeds,^e or in public documents duly authenticated,^f are admissible in evidence, their accuracy being proved in the manner required by law.

STATEMENTS IN PUBLIC AND OFFICIAL DOCUMENTS ADMISSIBLE.

60. Public and official documents, so far as relevant to the facts in issue, are usually admissible in evidence, and are also probative of the facts and procedure which it is their function to record.^g

61. In accordance with the rule (§ 58) that statements by third parties are admissible in evidence when proved correct, public and official documents, which possess more or less of a probative character, are admissible so far as relevant. In connection with their relevancy and admissibility, a few remarks

General remarks.

(a) *Steven v. Nicoll*, 9 Jan. 1875, 2 R. 292 ; *Livingstone v. Dinwoodie*, 28 June 1860, 22 D. 1333.

(b) D. 1178 ; L. J. Clk. Hope in *Thomson*, 1857, 2 Irv. 747 ; *M'Kay v. Davidson*, 1828, 6 S. 367.

(c) *Lauderdale Peerage*, 1885, 10 L. R., H. L., 692 ; *Mad. Smith*, 1857, 2 Irv. 641, 649, 662 ; cf. §§ 39, 213.

(d) *Smith v. Logan*, 1826, 5 S. 32 ; 1830, 5 W. & S. 47 ; *Catto & Co. v. Thomson*, 22 Nov. 1867, 6 M. 54.

(e) *Inf.* Chap. ix.

(f) *Inf.* §§ 60 et seq.

(g) D. 1051-1248 ; *Steph. Art.* 33-47 ; see also chap. xi. *inf.*

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Official documents may be probative ;

or conclusive ;

or afford *primâ facie* evidence only.

Statutes conclusive as to law enacted, but not as to facts stated.

Judicial records probative as to procedure, but not as to soundness of judgments.

Register of births affords *primâ facie* evidence only.

Following sections treat mainly of admissibility.

may be made here with regard to their weight and effect, which vary according to circumstances. Such documents, when *ex facie* regular, having been executed with the requisite solemnities, are usually probative of the facts which it is their function to record ; but they afford *primâ facie* evidence only of collateral or incidental facts which the framer was not bound to know and narrate. In some cases official writings afford conclusive evidence of the facts they set forth, and cannot be contradicted by any evidence whatever, while in other cases they are declared by statute to afford *primâ facie* evidence only, and may be contradicted by any competent evidence.

If, for example, the document be an Act of Parliament, it conclusively records the law enacted by the Legislature, which though possibly unsatisfactory, or ambiguous, or contrary to sound principle, cannot be impugned, but must be obeyed. But, as the function of a statute is to record rules of law and not matters of fact, it usually affords *primâ facie* evidence only of the facts it narrates.

Of most other public documents it is the primary function to preserve a record of facts. Judicial records, for example, narrate the procedure which has taken place in Court, but cannot vouch for the accuracy of the findings in fact or the soundness of the judgments of the Court. The procedure they set forth cannot, as a rule, be impugned ; but the findings in fact and judgments they narrate only bind the parties to the cause in which they are pronounced, except when the question is one of *status* or involving the interests of the public.^a In contrast to judicial records may be mentioned the register of births, deaths, and marriages, which is admissible in evidence, and may be probative of the fact that it was properly and regularly kept by the registrar, but cannot vouch for the accuracy of the information from which the entries were made.

The present part of this work treats chiefly of the admissibility of these and other public documents. The mode in which their accuracy is proved or impugned falls to be dealt with in connection with the subject of proof.^b

(a) L. Chan. Chelmsford in *Longworth v. Yelverton*, 30 July 1867, 5 M., H. L., 144.

(b) Chap. xi., xii.

ACTS OF PARLIAMENT ADMISSIBLE.

62. Statements of fact contained in public Acts of Parliament, when relevant to the issue, are admissible in evidence.^a

63. Public statutes, royal proclamations, and addresses by Parliament to the Crown, afford good *prima facie* evidence of the facts they narrate;^b but statements in local, personal, and private acts seem not now to be receivable in evidence.^c The authenticity of statutes printed by the authority of government does not require to be proved.^d The journals of the Houses of Lords and Commons afford evidence of the proceedings, but not of the facts stated by them.^e The *Rotuli Scotiæ* afford admissible evidence in questions of pedigree.^f

Statutes, proclamations, &c., afford *prima facie* evidence.

Journals of Parliament.

Rotuli Scotiæ.

The *Gazette* affords evidence of all public acts of government notified by it, and of advertisements inserted in it under the authority of the Court, but not of other matters.^g The publication of a fact in the *Gazette* is not relevant to infer knowledge of the fact on the part of persons not proved to have seen or read it, unless such publication is declared by statute to infer general knowledge of the fact.^h

Gazette is evidence of public facts.

JUDICIAL RECORDS ADMISSIBLE.

64. Judicial records, duly authenticated, are not only admissible, but form the only proper evidence,

(a) D. 1052-5; Steph. Art. 33; Act 13 & 14 Vict. c. 21, § 7; see also § 119, *inf.*

(b) *R. v. Sutton*, 1816, 4 M. & S. 532, *R. v. Francklin*, 1731, 17 St. Tr. 636.

(c) L. St. Leonards, *Shrewsbury Peer. Case*, 1857, 7 Cl., II. L., 13.

(d) Bell's Pr. 2208.

(e) D. 1056; Bell's Pr. 2210.

(f) D. 1057; *Craxford & Lindsay Peer.*, 1848, 2 Cl. & Fin. 534, 547.

(g) D. 1058; Bell's Pr. 2209.

(h) *Harrat v. Wise*, 1820, 9 B. & C. 712; 6 Geo. IV. c. 16, § 83.

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CH. iv. § 64. and are probative, of facts which it is their province to record.^a

Judicial records probative as to procedure ;

65. Judicial records narrate the procedure which has taken place in Court, including interlocutors, judgments, and the verdicts of juries, and are probative of that procedure.^b The verdict of a jury, when committed to writing by the clerk of Court, becomes part of the judicial record, and is therefore also probative.^c Under the Bankruptcy Act deliverances purporting to be signed by the presiding judge, and certified extracts or copies, are declared to be *prima facie* evidence.^d

but not as to facts beyond their province.

Judicial records are not, however, probative of facts merely incidental or collateral to those which it is their function to record ; nor do they prove important pleas or admissions which are properly authenticated by the parties' procurators. But of incidental admissions as to procedure, which are usually made orally at the bar, they are held probative unless immediately impugned.^e

JUDGMENT IN ONE CAUSE INADMISSIBLE IN OTHERS.

66. The judgment or verdict in one cause is inadmissible as evidence in any other, except in a question between the same parties or their representatives relating to the same issue.^f

(a) D. 48, 1060-88 ; §§ 120-8, *inf.*

(b) *Purves*, 1825, Sh. Just. 133 ; *Berry v. Wilson*, 1841, 4 D. 139.

(c) D. 48 ; *Morgan v. Morris*, 1858, 3 Macq. 337 ; *Dobbie v. Johnston & Russell*, 19 June 1861, 23 D. 1139 ; *Mill v. Nicoll*, 1767, Macclaur. 372.

(d) Act 19 & 20 Vict. c. 79, § 174.

(e) D. 1077-79 ; cases in Mor. 12, 525-35 ; *Davidson v. Heddell*, 10 Dec. 1829, 8 S. 219.

(f) D. 1081-6 ; 2 Al. 67 ; *Andersons v. Jeffrey*, 1826, 4 Mur. 99 ; *Macfarlane v. Young*, 1824, 3 Mur. 413 (overruling earlier cases) ; Steph. Art. 40-7.

67. While all judgments regarding matters of private right are conclusive against the parties to the cause in which they were pronounced, and against their representatives, they are not binding on any one else, and are therefore deemed irrelevant as evidence against third parties. The reason is, that, although the facts in a subsequent case may be substantially the same, evidence adduced by different parties regarding them may place them in a new light and be followed by a different result.^a In the one case the judgment constitutes a *res judicata* against the parties, and affords conclusive proof of its own effect; in the other it is *res inter alios acta* as regards different parties. For a similar reason a verdict in a criminal trial is not admissible as evidence in a civil action grounded on the same delict; and, conversely, a decree in a civil action is not evidence in criminal proceedings arising out of the same facts.^b

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Judgments conclusive against parties, but generally irrelevant against others.

Judgments are *res inter alios* as regards third parties.

A foreign judgment, when produced in the Scottish Courts, although relevant, affords *prima facie* evidence only against the parties to it.^c

Foreign judgments.

It has been repeatedly decided in England that the sentence of a competent Admiralty Court in one country, in a question of prize, is not only relevant but conclusive with regard to the question when it arises in any other country.^d

Sentence of Admiralty Court conclusive.

Where a judgment proceeds upon an averment or an admission by one of the parties, it is probably admissible, if not conclusive against him in any subsequent proceeding as evidence of the fact averred or admitted.^e

Judgment based on admission.

In criminal cases, extracts of previous convictions, sworn to apply to the prisoner, form the only proper evidence of crimes

Extract conviction only

(a) *Stone v. Gen. Marine Ins. Co.*, 3 July 1851, 13 D. 1288, where two trials upon the same evidence terminated in opposite verdicts.

(b) 2 Al. *sup.*; *Andersons v. Jeffrey, sup.*

(c) *Whitehead v. Thomson*, 20 March 1861, 23 D. 772; *Frisell v. Thomson*, 9 June 1860, 22 D. 1176; *Houlditch v. Marq. of Donegal*, 1834, 8 Bligh, N. R., 301, 338; cases in Roscoe, N. P., 14th ed., 201-8.

(d) Roscoe, N. P., 15th ed., 192.

(e) D. 1084-6; Steph. Art. 44.

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proper evi-
dence.

charged against him as an aggravation of his offence ;^a but they are deemed irrelevant and are therefore inadmissible for the purpose of showing the probability that he would commit the offence with which he is charged. It would, accordingly, be more consistent with justice that they should be withheld from the Court until after the verdict has been returned.^b

PUBLIC REGISTERS ADMISSIBLE IN EVIDENCE.

68. Public registers, regularly kept under official superintendence, and certified extracts from them, are not only admissible to prove facts relevant to the issue, but are probative of the facts which it is their province to record.^c

Registers ad-
missible, and
probative
of facts re-
corded.

69. The principal acts establishing a system of registration of deeds in Scotland declare that the registers and extracts from them shall, in all cases, 'make faith,' unless the deeds are offered to be 'improven.' These registers are therefore admitted, without proof of their authenticity, to prove any fact relevant to the facts in issue. The registers for preservation and execution (books of Council and Session and registers of inferior Courts) occupy a position similar to that of the judicial records of which they originally formed part, and the recording of a deed in these registers implies the consent of the granter to a judicial decree being pronounced against him.^d To this class belongs also the register for protested bills and promissory notes.^e The registers for preservation, which were also originally the books of the different Courts, contain authentic copies of the deeds recorded in them.^f Deeds conveying or affecting heritable rights, which are incomplete until

Registers for
preservation
and execu-
tion.

Registers for
preservation.

(a) Act 34 & 35 Vict. c. 112, § 18.

(b) Macd., 2d ed., 515.

(c) D. 1089-1173, 1249-86 ; Steph. Art. 34 ; Chap. xi. *inf.*

(d) Acts 1685, c. 38 ; 55 Geo. III. c. 70, § 4.

(e) Acts 1681, c. 20 ; 1696, c. 36.

(f) Acts 1698, c. 4 ; 49 Geo. III. c. 42, §§ 4-6.

registered, and various other documents, are recorded in the registers for publication.^a

70. Although the admissibility of evidence forms the proper subject of this part of the work, it may be convenient now to mention briefly the effect of the evidence afforded by some of the most important of the other registers and documents of a public or official character.^b In some cases they are declared by statute to be conclusive evidence of the facts they set forth, in others they are probative, and in others again they afford *primâ facie* evidence only.

Under the Merchant Shipping Acts^c the official register of British ships, certificates of registry, and certified copies of the register purporting to be signed by the registrar or proper officer, afford *primâ facie* evidence of all the matters recorded by them.^d As, however, 'any number of persons or any company' may claim to be beneficially interested in shares held by a registered owner,^e the trust reposed in him may be proved by his writ or oath, and the *primâ facie* evidence of the register thus rebutted.^f But until the evidence is rebutted, or the entry reduced on the ground of fraud or essential error, the register must receive effect.^g In any proceeding against a ship-owner in respect of loss of life, the master's list or the duplicate list of passengers, affords sufficient proof, in the absence of contrary evidence, that the persons in question were on board at the time of their death.^h

71. Parish registers recording births, deaths, and marriages down to the end of 1854 are *primâ facie* evidence of the facts they set forth, but only if they have been regularly kept.ⁱ Those

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Registers for publication.

Other registers admissible in evidence, with varying effect.

Registry of ship *primâ facie* evidence only ;

but must receive effect till reduced.

Registers of births, deaths, etc.

(a) See 'Tables of Statutes' in Appendix, and *cf.* § 120, *inf.*

(b) *Cf.* § 121, *inf.*

(c) D. 1108-25 ; 17 & 18 Vict. c. 104 ; 25 & 26 Vict. c. 63.

(d) Act 17 & 18 Vict. c. 104 ; § 107.

(e) Act 25 & 26 Vict. c. 63, § 37.

(f) Act 1696, c. 25.

(g) *Duffus & Lawson v. Mackay*, 13 Feb. 1857, 19 D. 430 *Bell v. Gow*, 19 Dec. 1862, 1 M. 183.

(h) Act 25 & 26 Vict. c. 63, § 56.

(i) *Watson v. Watson*, 10 May, 1836, 14 S. 734 ; 7 March 1837, 15 S. 753 ; *Hay v. Murdoch*, 19 Jan. 1854, 16 D. 364.

I.

CH. IV. § 71. kept under statutory authority since that date^a are of far higher authority, and are admissible in evidence throughout the British dominions; but, as the entries may have been made from false information, and the extracts may be inaccurate, both may be impugned on the ground of error, falsehood, or fraud. These registers therefore afford *prima facie* evidence only of the truth of the entries they contain, although probative of the fact that the entries were properly made.

Burgh books admissible, and probative as to procedure, &c.

Valuation Roll is evidence.

Register of Voters conclusive.

Other official books admissible.

72. Among registers of minor importance which are admissible in evidence^b may be mentioned the books of a burgh,^c which are necessary to prove the procedure observed at the election of magistrates,^d and to show who are members of the council.^e The Valuation Roll established by statute is declared to be, in questions relating to the franchise before any registration court, conclusive of the accuracy of the gross rental entered in it,^f while by a later statute it is declared to be only *prima facie* evidence of the value.^g The Register of Voters made up under the registration acts is declared to be conclusive evidence of the right of the persons entered in it to vote.^h

The books of the War Office,ⁱ the Board of Inland Revenue,^j the Board of Customs,^k and other government offices are admissible to prove facts which it is their function to record. The

(a) D. 1126-60; 17 & 18 Vict. c. 80 (Registration Act 1854); 18 Vict. c. 29; 23 & 24 Vict. c. 85.

(b) D. 1161-73.

(c) *Inf.* § 121.

(d) *Gardner v. Reekie*, 1828, 4 Mur. 438.

(e) *Black v. Campbell*, 1819, 5 Dow 23; *Ogilvy v. Mags. of Edin.*, 6 Feb. 1810, F. C.

(f) Act 17 & 18 Vict. c. 91, § 34.

(g) Act 19 & 20 Vict. c. 58, § 17; see also *Leith v. Leith*, 10 June 1862, 24 D. 1059; *Stevenson v. Miller*, 13 Nov. 1880, 8 R. 8.

(h) Acts 19 & 20 Vict. c. 58, § 44; 24 & 25 Vict. c. 83, § 42; 31 & 32 Vict. c. 48, § 31, and § 6 in connection with 19 & 20 Vict. c. 58, § 17; 35 & 36 Vict. c. 33, § 7; see also L. Mure in *Stevenson, sup.*

(i) *Kay v. Roger*, 25 June 1832, 10 S. 831.

(j) *Dunbar v. Harvie*, 1820, 2 Bligh, 351.

(k) *Tomkins v. Attorney-Gen.*, 1813, 1 Dow, 404.

books of the Bank of England,^a the official books of a prison, and the logbook of a man-of-war are also admissible for the same purpose, but not the logbook of a merchantman,^b unless it be an official log kept in the manner prescribed by statute.^c Public meteorological returns are also admissible to prove the state of the weather at any given period.^d

The register kept at Stationers' Hall is declared by statute to be *prima facie* evidence of the proprietorship of copyrights entered in it;^e and the registers of public companies, if regularly kept, are *prima facie* evidence of membership.^f

Register of copyrights is evidence ; of company is evidence of membership.

73. Minutes of the meetings of recognised public bodies are admissible as evidence of the proceedings which have taken place at them ;^g but their accuracy must be proved by the writer or by some one who was present, unless the question involved be one of ancient date.^h They form the proper evidence of such facts, but it is doubtful whether at common law they are necessary evidence.ⁱ Minutes of the meetings of public companies, however, are declared by statute to be evidence ; they are the necessary evidence of the facts they record, and are probative.^j In a liquidation, the books of the company are also evidence.^k

Minutes of public meetings admissible.

On the other hand, minutes of meetings held by private bodies, possessing no recognised *status*, are inadmissible except against persons who were present at the meetings and signed them.^l

Minutes of private bodies not evidence.

(a) Taylor, 8th ed., § 1595.

(b) *Wight v. Liddel*, 1829, 5 Mur. 36 ; 1 Bell's Com. 612, note 5.

(c) Act 17 & 18 Vict. c. 104, §§ 280-7.

(d) L. Shand in *Williams v. Dobbie*, 27 June 1884, 11 R. 988.

(e) Acts 5 & 6 Vict. c. 45, § 11 ; 7 & 8 Vict. c. 12, § 8 ; *Jeffreys v. Kyle*, 1856, 18 D. 907.

(f) *Macdonald v. City of Glasgow Bank*, 7 Feb. 1879, 6 R. 621 ; *Caled. Rail. v. Lockhart*, 14 June 1855, 17 D. 917 ; 25 & 26 Vict. c. 89, §§ 23, 37.

(g) D. 1168-73 ; Bell's Pr. 2222.

(h) *Lauderdale Peerage*, 1885, 10 L. R., H. L., 692.

(i) See, however, *Hamilton v. Hope*, 1827, 4 Mur. 239 ; *M'Ghie v. M'Kirdy*, 2 Jan. 1850, 12 D. 442.

(j) Act 25 & 26 Vict. c. 89, § 67 ; *Liqrs. of City of Glasgow Bank*, 20 July 1880, 7 R. 1196, 1199.

(k) Same Act, § 154.

(l) *Mackenzie v. Macartney*, 1831, 5 W. & S. 504, 513 ; *Johnston v. Scott*, 18 Jan. 1860, 22 D. 393 ; *Mathers v. Laurie*, 26 Dec. 1849, 12 D. 433.

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Minutes of public bodies inadmissible against third parties.

While minutes of recognised public bodies or mercantile companies prove their proceedings, and are evidence against them,^a they are inadmissible for the purpose of proving obligations against third parties.^b Such minutes have, however, been received as secondary evidence of matters affecting the rights of third parties, on the ground that they contained a statement by a party who had died before the trial, and a copy of a lost letter.^c

BOOKS AND PRIVATE DOCUMENTS WHEN ADMISSIBLE.

74. Public facts may be proved by accredited historical works ; and in questions of remote date, old chronicles, histories, and even private documents are received as adminicles of evidence.^d

Works on history evidence of public facts. Histories admissible in ancient questions.

75. Generally speaking, accredited works on history, and probably also maps and charts, are admissible to prove public historical or geographical facts, but not matters of private right.^e In matters of ancient date, however, and particularly in questions of pedigree, historical works compiled *ante litem motam*, tombstones, and even private plans, writings in family Bibles, diaries, and memoranda are admissible to prove private rights where no better evidence is procurable.^f

(a) *Ivison v. Edin. Silk Co.*, 26 Dec. 1846, 9 D. 1039.

(b) *Inglis v. Cunningham*, 1826, 4 Mur. 77 ; *King v. Mags. of Elgin*, 1714, M. 12,537.

(c) *A. v. B.* 1858, 20 D. 407. (d) D. 1174-78 ; Steph. Art. 35.

(e) L. Neaves in *Gibson v. Bonnington Sugar Ref. Co.*, 20 Jan. 1869, 7 M. 394.

(f) Stair, 4, 42, 16 ; 3, 5, 35 ; Ersk. 4, 2, 7 ; 3, 8, 66 ; *Humphreys*, Swinton's Rep. 173 *et seq.* ; see also *Place v. E. of Breadalbane*, 1874, 1 R. 1202 ; *Crawford & Lindsay Peer.*, 1848, 2 Cl. & Fin., 534 ; *Lauderdale Peerage*, 1885, 10 L. R., H. L., 692 ; *Lovat Peerage*, *ib.*, 763. So, too, a photograph would probably be admitted for the purpose of identifying a person resident in a foreign country, but has been rejected when the person was resident in Scotland : *Grieve v. Grieve*, 22 May 1885, 12 R. 969.

76. Business and account books, if regularly kept in the course of trade or other business, but not otherwise, are admissible as adminicles of evidence against third parties.^a By statute^b extracts from bankers' books are admissible as *primâ facie* evidence of the facts they record, but it must be proved that the books were regularly kept and that the copy is correct. Books kept by a tenant, the private books of a partner, and private diaries are not admissible as business-books;^c but such private books will usually be admitted in civil cases after a considerable interval, and where they form the best evidence obtainable.^d On the other hand, both business and private books are always admissible as evidence against their owner, so far as they contain admissions of liability under existing obligations or statements of facts.^e

CH. iv. § 76.

Business-books evidence against third parties.

Copies of entries in bankers' books *primâ facie* evidence.

Private books probably admissible where evidence scanty.

OTHER OFFICIAL DOCUMENTS ADMISSIBLE IN EVIDENCE.

77. Notarial instruments, messengers' executions, and extracts from public registers are admissible in evidence, and are usually probative when *ex facie* regular.^f

78. A notarial instrument is in certain cases required by law as evidence that the proper legal formalities have been observed, and when duly executed is probative of facts which it narrates officially, but not of extraneous circumstances.^g An

Notarial instruments admissible.

(a) D. 1179-85; Ersk. 4. 2. 4; 1 Bell's Com. 331; Bell's Pr. 2233-4.

(b) Act 42 Vict. c. 11.

(c) *Laing v. Hay*, 1829, 1 Deas & And. 23; *Smith v. Logan*, 1826, 5 S. 32; 1830, 4 W. & S. 47; *Hogg v. Campbell*, 9 June 1864, 2 M. 1158.

(d) L. J. Clk. Hope in *Fisher v. Fisher*, 5 Dec. 1850, 13 D. 245, 252; *sup.* §§ 74, 75.

(e) *Sup.* § 42; *Wardlaw v. Gray*, 1662, M. 12,620; *Lowrie v. Drummond*, 1675, M. 12,622; *Rhind v. Commercial Bank*, 1860, 3 Macq. 643.

(f) D. 1186-1286; Bell's Pr. 2220-1; see also §§ 117-24, *inf.*

(g) D. 1186-1212; Office of Notary, 6th ed.; M. Bell's Conv., 28.

I.

CH. iv. § 78. instrument of intimation of an assignation, for example, proves the intimation, but not the assignation itself or the right assigned.^a Notarial instruments have been sustained when executed by persons who were reputed notaries, and without proof of their actual appointment.^b Foreign notarial instruments are admissible in the courts of this country, provided the Court be satisfied as to the genuineness of the subscription.^c

Messengers' executions admissible.

79. An execution by a messenger-at-arms or a sheriff-officer, which is generally indispensable evidence of the fact that the parties or witnesses in a cause have been duly cited, or that a summons or petition or other legal document has been served, or that a diligence has been executed, is also admissible in evidence, and is probative of the procedure it narrates when *ex facie* regular.^d As in the case of notarial instruments, executions by reputed messengers have been sustained in civil cases,^e but they would probably be held inept in criminal proceedings.^f

Extracts from registers admissible.

80. Like the public and official registers themselves, official extracts from them, when regular and duly authenticated, are admissible in evidence, and are probative of the facts they record; and they cannot be impugned except in an action of reduction,^g unless it be averred that they are disconform to their warrant or are misdated.^h Such extracts owe their admissibility to the fact that they are carefully prepared by qualified and responsible persons. An extract from a judicial record is, therefore, inept when made by the judge himself or other unauthorised person;ⁱ but the Court may authorise the correction of errors in an extract.^j

Extracts from judicial records admissible because trustworthy.

(a) Ersk. 4. 2. 5.

(b) *Spence v. Reid*, 1610, and *Douglas v. Christie*, 1615, M. 3902.

(c) *Cunningham*, 1850, 12 D. 743; *cf. Disbrow v. Mackintosh*, 1852, 15 D. 123.

(d) D. 1213-48, 1887-1907; Darling's Messengers-at-Arms.

(e) *Stuart v. Hay*, 1676, M. 3092; *Lermont v. Lermont*, 1699, M. 3096; but see *Hunter v. Montgomery*, 1732, M. 3097.

(f) 2 Hume, 242.

(g) D. 1249-82; M. Bell's Conv., 99, 221, &c.; see also *sup.* § 69.

(h) *Stair*, 4. 1. 45; 4. 42. 10.

(i) *Inf.* § 120.

(j) *Stair, sup.*; § 120, *inf.*

81. Most of the above remarks apply also to extracts from registers of deeds, especially when recorded for preservation and execution, in which case the extracts are not only admissible, but are equivalent to extracted decrees. If, however, the original deed itself be challenged, an extract is inadmissible, and the original must be produced, unless kept in the register, in which case it is held to be *in manibus curiæ*. In other words, an extract will always 'satisfy production,' except in actions of reduction-improbation.^a If a deed retained in the register be lost, an action of proving the tenor may be raised, and the extract decree in the action will then be admissible in evidence as equivalent to the original.^b In many other cases extracts relating to private rights are declared by statute to be probative except in improbations.^c Certified or examined copies of official writings^d are also frequently declared by statute to be evidence;^e but otherwise the accuracy of copies must be proved by persons who have compared them with the originals. In the case of private unregistered documents, copies are not admissible unless taken at the sight of a commissioner appointed by the Court,^f and in criminal cases the documents themselves must always be produced if possible.

CH. iv. § 81.

Extracts from registers admissible, except in actions of reduction.

Certified and examined copies admissible.

Copies of private writs not probative.

82. Extracts from the registers of births, deaths, and marriages kept under statutory authority are admissible, and they prove the fact that they are correct copies of entries properly made; but they afford *prima facie* evidence only of the truth of the information upon which the entries were inserted.^g Extracts from the old parish registers are also usually regarded as

Extracts from registers of births, deaths, and marriages.

(a) Act 1581, c. 119; 1617, c. 16; 1681, c. 11; 1698, c. 4; Stair, 4. 20. 21; Ersk. 4. 1. 22; *Paterson v. Houston*, 14 Dec. 1837, 16 S. 225; *Farquhar v. Lyon*, 1681, M. 6692 (and many other cases under 'Improbation,' Sect. 5).

(b) *Inf.* § 103.

(c) See 'Table of Statutes,' Appx., *inf.*

(d) D. 1280-82.

(e) *E.g.* in Copyright Acts: 5 & 6 Vict. c. 45, § 11; 7 & 8 Vict. c. 12, § 8; 25 & 26 Vict. c. 68, § 5; documents in custody of Accountant of Court: 12 & 13 Vict. c. 51, § 36.

(f) *Beattie v. Paterson*, 20 Jan. 1863, 1 M. 279.

(g) Act 17 & 18 Vict. c. 80, § 58; see also *sup.* § 71.

I.

CH. iv. § 82. admissible and probative of the respective entries ;^a but as their value depends solely on the mode in which the register has been kept, the books themselves afford the only satisfactory evidence, and will generally require to be produced.

Extracts
from foreign
documents
admissible on
proof of
authentic-
ation.

83. Extracts from foreign registers and copies of foreign official documents are only admissible if proved, by the attestation of a notary or other official, to be duly authenticated in accordance with the law of the country from which they come.^b In the absence of the originals or officially authenticated extracts, excerpts must be proved by calling the registrar or custodier as a witness.^c If an extract from a recorded deed is not admissible in a foreign country, the Court may authorise the original to be sent ; but no document forming part of the judicial or public records can be removed from Scotland.^d

(a) D. 1271 ; Tait, 201.

(b) D. 1283-86 ; *Disbrow v. Mackintosh*, 27 Nov. 1852, 15 D. 123 ; *Frizell v. Thomson*, 9 June 1860, 22 D. 1176 ; *Whitehead v. Thomson*, 20 March, 1861, 23 D. 772.

(c) *Maitland v. Maitland*, 20 March 1885, 12 R. 899.

(d) *Dunlop*, 30 Nov. 1861, 24 D. 107 ; *Kennedy*, 13 July 1880, 7 R. 1129 ; *Power*, 18 March 1859, 21 D. 782. As to the mode of proving statements in public documents, see *inf.* ch. xi.

CHAPTER V.

OPINIONS GENERALLY IRRELEVANT.

84. THE opinion of a witness regarding a fact in issue or relevant to the issue is generally irrelevant ; but the opinion of experts is deemed relevant with regard to scientific or other matters of which the Court is unable to judge.^a

85. Witnesses are usually examined only as to facts which have fallen under their own observation, and it is the province of the Court or jury to form their opinion from such facts ; but it is competent to ask a witness what impression was produced on his mind by facts observed by himself at the time of their occurrence, as the impression may be distinct and trustworthy, although the witness cannot remember or describe all the facts which produced it.^b For the same reason, when a witness identifies a person, a handwriting, or other object, or declares that a person was in his sober senses, he really states the impression produced on his mind by a number of circumstances which he could not describe singly. It is also competent to examine a witness as to his own opinion or belief, where its existence as a fact, irrespectively of its accuracy, is in issue ;^c

I.
CH. v. § 84.

Opinions in-
admissible,
unless based
on *res gestæ*
observed by
witness.

Belief as to
identity,
handwriting, &c., admis-
sible.

(a) D. 1987-2004, 80, 756, 918-25 ; Steph. Art. 48-52.

(b) *King v. King*, 2 Feb. 1842, 4 D. 590 ; *Edwards v. M'Intosh*, 1823, 3 Mur. 374.

(c) *Humphreys*, 1839, Sw. Rep. 110.

I.

CH. v. § 85.

but it is incompetent to ask a witness what opinions were expressed to him by others,^a as such evidence would be hearsay of the most objectionable type.^b

Incompetent to ask opinion as to point of law.

In accordance with the general rule, it is incompetent to examine a witness as to his opinion on a point of law;^c but foreign lawyers may be examined as experts on questions of foreign law, and their opinions then form facts from which the Court must draw its own conclusion.^d

Experts defined.

Opinion confined to matters of which Court cannot judge.

86. When 'experts,' or persons theoretically or practically qualified to give an opinion on matters of which the Court is unable to judge, are adduced as witnesses, the first question is, whether they are truly 'men of skill.'^e The opinion of an expert must be confined to matters regarding which a man of skill alone can form an opinion.^f It is within the discretion of the Court to admit experts to hear the examination of witnesses as to questions of fact, in order that they may form their opinion upon an actual and not a hypothetical case.^g The data on which an expert has formed his opinion must be clearly ascertained, lest he may have been influenced by hearsay or by statements made by interested parties.^h Proof of facts relevant to confirm or contradict the opinions of experts is admissible, although the facts be quite irrelevant to the main issue.ⁱ

Expert must form opinion on ascertained facts.

(a) L. Pr. Inglis in *Apthorpe v. Edin. Tram. Co.*, 13 Dec. 1883. 10 R. 351.

(b) *Sup.* §§ 6, 36.

(c) *Rawson v. Johnston*, 19 July 1833, 11 S. 1011.

(d) *Kerr v. Fyffe*, 4 June 1840, 2 D. 1001. Facilities for the ascertainment of English and foreign law are now afforded by 22 & 23 Vict. c. 63, 24 Vict. c. 11, and 41 & 42 Vict. c. 67, § 3; see also *Blonay v. Oswald's Reprs.*, 17 July 1863, 1 M. 1147.

(e) *Schuermans v. Stephen*, 18 July 1832, 10 S. 839; *Macleod v. Macleod*, 1824, 3 Mur. 431.

(f) L. J. Clk. Inglis in *Morrison v. Maclean's Trs.*, 1862, 24 D. 626; *Campbell v. Tyson*, 22 Dec. 1841, 4 D. 342; *Henderson*, 1836, 1 Sw. 316, 326.

(g) D. 1973; *Mad. Smith*, 1857, 2 Irv. 641; *Campbell v. Tyson*, *sup.*: 3 & 4 Vict. c. 59, § 3; see also § 169, *inf.*

(h) *Shiells*, 1846, Ark. 171.

(i) Steph. Art. 50; *Palmer's Case*, p. 124, &c.

In civil cases tried without a jury the opinion of men of skill is frequently obtained under a remit from the Court, and is binding when the parties have consented to or acquiesced in the remit.^a

CH. v. § 86.

Reports by men of skill in civil cases usually conclusive.

87. It is competent to adduce engravers or other persons skilled in comparing handwritings,^b in order that they may compare a disputed handwriting with one proved or admitted to be genuine, and give an opinion as to its genuineness; but such evidence is usually of little value, unless the expert be personally acquainted with the handwriting of which the disputed document is said to be an imitation.^c

Comparatio literarum may be made by experts;

Somewhat less unreliable than the evidence of experts who are unacquainted with the genuine handwriting is that of ordinary witnesses who are acquainted with it. The person whose writing is said to have been forged or imitated, or, in his absence, some one acquainted with his writing, should, if possible, be called to prove the forgery.^d If the writing in issue be glaringly different from the genuine, the judge and jury may form an opinion for themselves.

or by persons acquainted with the genuine writing.

Facsimiles and lithographs of genuine writings are not admissible for the purpose of comparison.^e

Jury may form own opinion.

(a) *Arnot v. Brown*, 1852, 1 Macq. 229; *Brown v. Love*, 15 Jan. 1842, 4 D. 386; *Pearce Broth. v. Irons*, 25 Feb. 1869, 7 M. 571, 386; *Dixon v. Monkland Can. Co.*, 1825, 1 W. & S. 636. Reports by accountants, however, are not generally conclusive: *Gibson v. Ewan*, 11 Dec. 1852, 15 D. 211.

(b) *Beveridge*, 1860, 3 Irv. 625.

(c) *Cf.* § 127, *inf.*

(d) *Ibid.*

(e) *Ibid.*

CHAPTER VI.

EVIDENCE OF CHARACTER GENERALLY
IRRELEVANT.

I.

CH. vi. § 88.

88. EVIDENCE of a party's character (*i.e.*, reputation) is generally deemed irrelevant.^a

Exceptions
to rule.

Pursuer's
character
may be set
up; but not
assailed,
unless set up
by himself
or impugned
on record.

89. When a party's character or reputation is itself the fact in issue, evidence regarding it may be adduced. Thus, in an action of damages for slander, the character of the pursuer or injured person may competently be 'set up.'^b Conversely, when the pursuer has led evidence in support of his character, or when the defender has impugned it on record, or takes an issue of *veritas convicii*, the defender may lead evidence to prove his averments:^c but not otherwise, as the pursuer would thus be taken by surprise and prejudiced.^d In an action of reparation for bodily injury the defenders, without notice on record, have been held entitled to attack the pursuer's character for sobriety;^e but the admissibility of such evidence cannot be affirmed as a general rule. As a rule, when character is competently attacked,

(a) D. 22-34, 271, 1794, 1798, 1933; Steph. Art. 55-7.

(b) *M'Neil v. Korison*, 12 Nov. 1847, 10 D. 15, 17; *Brodie v. Blair*, 17 July 1834, 12 S. 941, 944; Macf. Pr. 216.

(c) Macf. *sup.*; *Wilson v. Weir*, 22 Nov. 1861, 24 D. 67; *Mackellar v. D. of Sutherland*, 14 Jan. 1859, 21 D. 222.

(d) *Bryson v. Inglis*, 15 Jan. 1844, 6 D. 363; *Blaikie v. Duncan*, 11 July 1857, 19 D. 983, 987, 1095; *Craig v. Jex-Blake*, 7 July 1871, 9 M. 973.

(e) See L. J. Clk. Inglis in *Butchart v. Dundee Rail. Co.*, 9 Dec. 1859, 22 D. 184.

evidence of general character alone is admitted, and proof of particular acts excluded, unless they have been specifically averred.^a Again, in an action of damages for wrongous imprisonment, where the pursuer's character is in issue, the defender may competently prove the pursuer's previous bad character in justification of his proceedings.^b

In civil cases the defender's character is generally deemed irrelevant, and may neither be set up nor attacked.^c If, however, the action involves the defender in a criminal charge, it is thought that he should be entitled to lead evidence of good character, as he could competently do if tried criminally.^d

90. In criminal cases the good character of the accused is deemed relevant, while his bad character is generally deemed irrelevant.^e Evidence that his character is good is admissible for the purpose of showing the improbability that he would commit the offence with which he is charged; but certificates of good character, the writers of which are not called, are inadmissible except in mitigation of punishment after the prisoner has pleaded guilty.^f Evidence that the accused bears a bad character can only be led by the prosecutor when the accused has endeavoured to set up his character; but in a case of theft, on due notice being given in the libel, the prosecutor may prove that the accused is 'habite and repute a thief,' not for the purpose of aiding his proof (although that result is hardly avoidable), but as an aggravation of his offence. In other criminal cases, proof of previous convictions of offences similar to that charged is also admissible for the same purpose, although it would be more equitable to withhold such proof until after the prisoner has pleaded guilty or been convicted. To this last rule, however, there is a statutory exception in coining cases, in which the proof of previous convictions is so withheld.^g

CH. vi. § 89.

Character of defender irrelevant.

Relevancy of character in criminal cases.

Good character deemed relevant.

Bad character generally deemed irrelevant; but 'habite and repute thief' and previous convictions may be proved.

(a) D. 33; *Macfarlane v. Young*, 1824, 3 Mur. 412.

(b) *Nimmo v. Stewart*, 18 July 1832, 10 S. 844.

(c) Macf. Pr. 218; *Kitchen v. Fisher*, 1821, 2 Mur. 591.

(d) D. 31.

(e) D. 30; Steph. Art. 56.

(f) *Stalker*, 1844, 2 Br. 79; *Rosenberg*, 1842, 1 Br. 367.

(g) Act 24 & 25 Vict. c. 99, § 37.

I.

CH. vi. § 90.

Character of injured person may be attacked where special defence.

In cases of rape no special defence necessary, but notice of attack requisite.

Always competent to set up woman's character.

In cases of assault, homicide, or murder, the passionate or violent character of the injured or deceased person may be proved on due notice of this special defence being given; but evidence of particular acts of violence is inadmissible, unless they formed part of the *res gesta*.^a In cases of rape also, the immoral character or immodest conduct of the woman at or about the time of the offence charged may always be proved on notice being given, though without special defence, and it may be proved without notice if the prosecutor has endeavoured to set up the woman's character.^b It has been held that evidence of acts of immodesty with persons other than the accused is irrelevant, whereas proof of the woman's general reputation for chastity has been admitted.^c The distinction is a somewhat narrow one, and has not always been observed in practice.^d Evidence of immorality immediately after the offence charged seems clearly relevant for the purpose of showing the woman's general character.^e Lastly, it is always competent to the prosecutor to set up the woman's character, whether it has been impugned or not, but he thereby exposes it to the risk of attack.^f

(a) *Shiels*, 1846, Ark. 171; *Irving*, 1838, 2 Sw. 109; *Brown*, 1836, 1 Sw. 293.

(b) 1 Hume, 304, and note; *Forbes*, 1858, 3 Irv. 186; *Leitch*, 1838, 2 Sw. 112.

(c) *Allan*, 1842, 1 Br. 500; *Reid*, 1861, 4 Irv. 124.

(d) *Dignan*, 1854, 1 Irv. 357.

(e) *Leitch*, *sup.*

(f) *M'Millan*, 1846, Ark. 209; *Wilson*, 1813, 1 Hume, 304.

PART II.

PROOF.

CHAPTER VII.

FACTS OF WHICH NO EVIDENCE IS REQUIRED.

91. FACTS of which it is the duty of judges to take judicial notice, facts judicially admitted, and probative documents do not require to be proved.^a

II.
CH. vii. § 91.

92. Foremost among facts which it is the duty of every judge to know, and of which it is therefore unnecessary to adduce proof, is the existence of the written and unwritten law of the land. All public Acts of Parliament are presumed to be known to every one, and are therefore judicially noticed, any dispute as to their terms being determined by production of a copy printed by the Queen's printers;^b and all private acts passed since 4th Feb. 1851 must also be judicially noticed.^c Among other facts of which probably no proof is required are those relating to the administration of the country, so far as publicly and generally known, the extent of the Queen's dominions, the

Judicial notice.

Acts of Parliament, public and private.

Facts patent to every one.

(a) D. 1052-58, 1117, 1249, 1272-74, 1386-1404, 1490, &c.; see also *sup.* §§ 60-83, and 'Table of Statutes' in Appx., *inf.*; Steph. Art. 58-60.

(b) Act 41 Geo. III. c. 90, § 9.

(c) Act 13 & 14 Vict. c. 21, § 7.

II.

CH. vii. § 92.

Facts which statute requires to be noticed.

Court may refer to books or persons.

Facts judicially admitted require no proof.

Judicial admissions conclusive only in cause in which made.

Exceptions to rule.

Admissions not binding

existence and titles of the sovereign powers recognised by the Queen, the ordinary and generally known course of nature, the meaning of English words, and all matters which are required by statute to be judicially noticed.^a On the other hand, when the memory of the judge requires to be assisted by reference to approved records of public facts, such as almanacs, gazettes, dictionaries, histories, and maps, or to persons familiar with such facts, the party moving him to take judicial notice of the fact in question is bound to afford such assistance.

93. Closely akin to facts which it is the duty of judges to know and to notice judicially are facts judicially admitted and thus rendered public by the parties.^b Judicial admissions, or statements by a party against his interest,^c may be made on record, or by written minute, or orally at the bar, and are generally binding on the parties who make them and on the judge or jury who try the cause. Failure to deny facts which are relevantly averred is held equivalent to an admission of them,^d but a pursuer need not expressly deny the defender's statement of facts; and when a defender pleads that a claim has been extinguished by prescription, he is not bound expressly to deny its existence.^e The party making an admission is only bound by it in the cause in which it is made. In other causes it may be used as evidence against him, but is not conclusive.^f

To this rule, however, there are some exceptions. An admission, for example, that the party entered verbally into a contract which law requires to be in writing does not bind him, as he is entitled to resile from his informal undertaking unless it has been validated by *rei interventus*.^g In consistorial

(a) See Steph. *sup.*, and authorities there cited. The principle on which facts are judicially noticed in England appears substantially to be that judges cannot be held '*non intelligere id, quod omnes intelligunt.*' The Scottish authorities abstain from any enumeration of such facts, but the above list may be useful as showing their general character.

(b) D. 1386-93.

(c) *Sup.* § 41.

(d) 1 Mackay, 433.

(e) *Alcock v. Easson*, 20 Dec. 1842, 5 D. 356.

(f) Mackay, *sup.*; D. 1434; *sup.* §§ 52-4.

(g) See §§ 107, 137, *inf.*

causes also, and more particularly in actions of divorce and separation, judicial admissions by a party against himself are not conclusive without other evidence, as they may have been made collusively.^a Extrajudicial admissions, on the other hand, which of course require to be proved, are less likely to have been made collusively, and are therefore more trustworthy.^b It has been doubted whether, in cases in which a party is required by statute to prove his case by the writ or oath of his opponent, a judicial admission by the latter is equivalent to his writ or oath.^c But a distinct admission of liability on record is equivalent (or rather supersedes the necessity of referring) to the defender's writ or oath, a mode of proof which, like any other, is only required when the defender denies his liability.^d If a qualification be adjoined to the admission, it may, when extrinsic, be disproved or disregarded.^e If the admission, though not on record, be made judicially by the party's counsel or agent, it is thought that the party could not repudiate it except on the grounds of fraud or essential error.

CH. vii. § 93.

on party
entitled to
resile ; nor
conclusive in
consistorial
causes.

Admission on
record equi-
valent to writ
or oath.

Lastly, in criminal cases, a prisoner's admission of guilt in open court is conclusive against him.^f

Plea of guilty
conclusive in
criminal case.

(a) Act 11 Geo. IV. & 1 Will. IV. c. 69, §§ 33, 36; 24 & 25 Vict. c. 86, § 11; *Macfarlane*, 18 Jan. 1847, 9 D. 500; 2 Fraser, H. & W., 2d ed., 1169; 2 Mackay, 275, 288.

(b) *Fullerton*, 20 June 1873, 11 M. 720.

(c) *Cullen v. Smeal*, 12 July 1853, 15 D. 868; L. Jeffrey in *Darnley v. Kirkwood*, 6 March 1845, 7 D. 595, 602.

(d) D. 408, 1487; L. Mackenzie in *Darnley (sup.)*, p. 603.

(e) *Couper v. Young*, 28 Nov. 1849, 12 D. 190; see also §§ 200-4, *inf.*

(f) D. 1393; *sup.* § 47.

CHAPTER VIII.

FACTS MAY GENERALLY BE PROVED BY ORAL
EVIDENCE.

II.

CH. viii. § 94.

94. ALL facts may be proved by oral evidence, except those^a which law requires to be proved by written evidence, or by the writ or oath of party.^b

Oral evidence must generally be primary.

Crime, fraud, and error may be proved by parole.

95. When a fact can competently be proved by parole or oral evidence, the evidence must be primary or direct, *i.e.*, it must be the testimony of witnesses who saw, heard, or perceived the fact. Such evidence, as already stated, generally excludes hearsay or secondary evidence.^c The rules which require certain facts to be proved by writ,^d or by the writ or oath of party,^e do not apply to crime, fraud, or essential error, which, when relevantly averred, may almost always be proved by parole.^f To this last rule, however, there is this exception, that documents which law declares to be conclusive^g cannot under any circumstances be contradicted.

Rule requiring written evidence relaxed where inequitable.

It may also be mentioned here that the rule which requires certain facts to be proved by formal writ is sometimes relaxed. Where, for example, consent to a contract must, strictly speaking, be proved by formal writ, it may generally also be proved

(a) *Inf.* chapters xiv., xv.

(b) D. 538-634, 110-238, etc. ; Steph. Art. 61-2.

(c) *Sup.* § 36.

(d) *Inf.* § 98.

(e) *Inf.* §§ 140-8.

(f) D. 174-7, 344-5, 359, 578, 628 ; *Ferguson, Davidson, & Co. v. Jolly's Tr.*, 1880, 7 R. 500 ; *Little v. Smith*, 1845, 8 D. 265.

(g) *Sup.* § 72.

by informal writ, or even by parole evidence, provided the contract has been acted upon by the parties.^a This relaxation of the rule may be regarded as a corollary to the rule which admits parole evidence of fraud and *mala fides*, as it would be inconsistent with good faith that one of the parties should repudiate a contract upon which he had induced or permitted the other party to act. The rules which in certain cases absolutely or partially exclude parole evidence will be found in Chapters xiv. and xv.

(a) *Inf.* §§ 108-111.

CHAPTER IX.

REQUISITES OF PRIVATE DOCUMENTARY EVIDENCE.

PROBATIVE DEEDS.

II.

CH. ix. § 96.

96. DEEDS tested in the manner required by statute, and holograph deeds containing a declaration that they are holograph, are probative.^a

Different
kinds of
documentary
evidence.

97. Private documentary evidence is afforded by writings of four different kinds: (1) Tested deeds, executed with the legal solemnities; (2) Holograph deeds; (3) Writings in *re mercatoriâ*; and (4) Private and informal writings and memoranda regarding non-mercantile matters. Writings of the first and second class alone are probative in the strict sense of the word; those of the third class are treated as probative when their authenticity is not challenged; and those of the fourth class, though *per se* improbative and usually inadmissible, may become evidence when interpreted by the actings of the parties. Intermediate between private and public^b documentary evidence are the registers, documents, and minutes of public companies, the authentication of which is chiefly regulated by statute.^c

(a) D. 636-750, 812-14, 751-83; *sup.* § 5; *cf.* Steph. Art. 63-72.

(b) *Sup.* §§ 60-83; *inf.* §§ 117-24.

(c) *E.g.* 25 & 26 Vict. c. 89, §§ 37, 67, 154; 33 & 34 Vict. c. 61, § 17; 40 & 41 Vict. c. 26, § 6; *cf.* § 122, *inf.*

98. All deeds relating to heritable title, and obligations of great importance,^a *i.e.*, with regard to sums exceeding £100 Scots (with the exceptions afterwards mentioned, §§ 104 *et seq.*) must, in order to be probative and effectual, be either holograph or tested; *i.e.*, they must either be subscribed by the granter and two witnesses duly designed,^b or they must be holograph of the granter.

CH. ix. § 98.

Certain deeds ineffectual unless probative.

The rules regarding the authentication of private deeds belong to the province of conveyancing, but as they are closely connected with the law of evidence they may be shortly stated here. The granter must sign each sheet of the deed.^c If his hand has been led, the deed is null, but support to the arm or wrist is permissible.^d If he sign the last sheet only, or merely initial it, the deed will not be null, but may be proved genuine.^e Deeds signed with a mark or cross are null.^f It is advisable that the deed should be read to or by the granter before subscription.

Requisites of tested deeds.

Any one above the age of fourteen, and not insane or blind, may be an instrumentary witness,^g and the same two witnesses may attest any number of subscriptions. The witnesses must not be parties to the deed. They must know the granter, or must be informed by credible persons that the subscriber is the granter.^h They must see him subscribe or hear him acknowledge his subscription, but the acknowledgment may probably also be made by signs. Acknowledgment by a blind person after the deed had been out of his hands, would be insufficient, unless he had special means of identifying it.ⁱ The witnesses may sign at different times, and even long after the granter has subscribed

Persons over fourteen, not insane or blind, may witness deed.

Granter must sign or acknowledge signature in their presence.

(a) Act 1579, c. 80.

(b) Acts 1681, c. 5; 1696, c. 15; 19 & 20 Vict. c. 89; 37 & 38 Vict. c. 94, § 38; D. 636-44; Ersk. 3. 2. 10, 13.

(c) *M'Laren v. Menzies*, 20 July 1876, 3 R. 1151.

(d) *Noble v. Noble*, 1875, 3 R. 74.

(e) *M'Laren v. Menzies*, *sup.*

(f) D. 655-72; 1 M. Bell's Conv. 49.

(g) D. 689-92; 31 & 32 Vict. c. 101, § 139.

(h) D. 687-8, 693-7; Act 1681, c. 5.

(i) D. 694.

II.

CH. ix. § 98.

They must
be designed.Notarial sub-
scription.Grantee
should be
fully named
and de-
signed.Function of
testing-
clause.

or acknowledged his subscription;^a but they cannot of course sign before the granter.^b Whether they can sign after the granter's death is very doubtful.^c They need attest the granter's subscription on the last page only. In all cases the deed must be complete before it is produced in judgment.^d The designation (*i.e.*, occupation and residence^e) of each witness must be added to his name or stated in the testing-clause.^f

99. If the granter cannot write, the deed must be subscribed by a notary or a justice of peace authorised by him.^g The notary must know the granter, and the witnesses must see or hear the granter authorise the notary to subscribe.^h The notary's docquet must be holograph,ⁱ and must state that the deed was read to the granter in presence of the witnesses.^j

The grantee should be correctly named and designed, but slight errors are disregarded, *dummodo constet de personâ*; and where several persons answer the description, the doubt may be removed by extrinsic evidence.^k

If the deed contain erasures, additions, or alterations, they must, in order to receive effect, be enumerated in the testing-clause, where it must be stated that they were made before subscription by the granter. The designations of the witnesses, if not appended to their names, must be mentioned in this clause.^l The date and place of subscription and other particulars usually inserted in the testing-clause are not essential.^m The testing-

(a) *Stewart v. Burns*, 1 Feb. 1877, 4 R. 427.

(b) *Smyth v. Smyth*, 9 March 1876, 3 R. 573.

(c) *Arnott v. Burt*, 14 Nov. 1872, 11 M. 62.

(d) D. 698-702; *Hill v. Arthur*, 1870, 9 M. 223; *Millar v. Birrell*, 1876, 4 R. 87.

(e) *Joel v. Gill*, 23 Nov. 1859, 22 D. 12.

(f) D. 719-23; Act 1681, c. 5.

(g) Act 1579, c. 80; 37 & 38 Vict. c. 94, § 41.

(h) D. 673-83; Act 1681, c. 5; A. S. 21st July 1688.

(i) *Henry v. Reid*, 10 Feb. 1871, 9 M. 503.

(j) Act 37 & 38 Vict. c. 94, § 41.

(k) D. 644; 213-5; *inf.* § 139.

(l) *Macdougall v. Macdougall*, 15 June 1875, 2 R. 814.

(m) See M. Bell's Conv. 33, 62, 65, 67, 232, &c.

clause may be added at any time before the deed is produced in judgment, and even after the granter's death.^a CH. ix. § 99.

A deed signed by a granter and two witnesses, but defective in any of the solemnities required by statute, is improbable, but not invalid, the defects being remediable by parole evidence.^b Defects in deed when curable by parole.

Lastly, it may be mentioned here that the omission of conventional solemnities prescribed by the parties to a deed will invalidate it.^c Omission of conventional solemnities fatal.

100. Holograph deeds are probative when they declare that they have been wholly, or at least in their essential parts, written by the granter; but they do not prove their own dates, unless of a testamentary character,^d or acknowledging intimation of an assignation.^e The fact that the deed is holograph, if not stated, must be proved by extrinsic evidence.^f Vitiations or alterations should be mentioned by the granter, but holograph additions need not be signed. Alterations not mentioned must be proved by other evidence.^g In some cases the document need not be signed if it bear the granter's name *in gremio*, or if it be of a kind not usually signed, as an entry in an account-book or a postscript to a letter. A letter signed by one of several partners on behalf of a firm is holograph of the firm.^h In order to constitute a binding contract with regard to heritage, a holograph offer must be met by a holograph acceptance.ⁱ Holograph writings probative, but do not prove own date. Genuineness of alterations must be proved by other evidence.

101. Deeds probative in point of form may be rendered improbable by vitiation. A blank in an essential part invalidates a deed, unless filled up in presence of the witnesses and before

(a) Bell's Pr. 2226; *Veasey v. Malcolm's Trs.*, 2 June 1875, 2 R. 748; see also *Stewart and Hill*, p. 64, notes a and d.

(b) Act 37 & 38 Vict. c. 94, § 39.

(c) D. 743-7; *Nasmyth v. Hare*, 1821, 1 S. Ap. 66; *Wilsone's Trs. v. Stirling*, 13 Dec. 1861, 24 D. 175.

(d) Act 37 & 38 Vict. c. 94, § 40.

(e) D. 766.

(f) *Anderson v. Gill*, 20 July 1850, 20 D. 1326; 1858, 3 Macq. 180.

(g) *Mags. of Dundee v. Morris*, 1858, 3 Macq. 134, 152-3.

(h) *Nisbet v. Neil's Tr.*, 20 July 1869, 7 M. 1097.

(i) *M'Laren v. Law*, 24 Oct. 1871, 44 J. 17.

II.

CH. IX. § 101.

Deed proba-
tive in form
may be viti-
ated by
blanks.

delivery. Bonds blank in the creditor's name are prohibited,^a but the prohibition does not include bills, promissory notes, and bills of lading, and probably such other documents also as are held in accordance with the usage of trade to be transferable to an unnamed bearer.^b Trustees or others may be authorised to fill up blanks. If a blank has been obviously filled up after the completion of the deed, or if the testing-clause mention the leaving of a blank, the party founding on the deed must prove that it was properly filled up.^c A deed is also rendered null by erasures or similar vitiations *in essentialibus*, unless they be mentioned in the testing-clause, and the defect cannot be remedied by extrinsic evidence, except when the vitiation be alleged to have been fraudulent.^d

Deed null if
vitiated *in
essentialibus*.

On the other hand, unauthenticated additions, or words written on an erasure in an unessential part, when not mentioned in the testing-clause, are held *pro non scriptis*, while a word merely struck out by the pen would probably be read as still standing.^e If, however, unauthenticated additions be holograph, they may be proved genuine by parole evidence and will receive effect.^f If a deed vitiated *in substantialibus* has been executed in duplicate, and the other copy be not vitiated in the same parts, the two may be sustained as one deed.^g

What are
essentials?

Among the essentials of a deed are the name of the lands in a disposition, the sum in a bond, the name of the grantee, unless merely a trustee, the duration of a right, and the conditions under which it is granted.^h A registered deed is no longer challengeable on the ground that part of the record is written

(a) Act 1696, c. 25.

(b) *Merchant Bank. Co. of London v. Phoenix Bessemer Steel Co.*, 1877, 5 Ch. D. 205.

(c) D. 645-54.

(d) D. 871-88, 724; 1 M. Bell's Conv., 2d ed., 67-77.

(e) See *Morgan v. Morris*, 1858, 3 Macq. 323; *Chapman v. Macbean*, 10 Feb. 1860, 22 D. 745.

(f) D. 754-5; *Robertson v. Ogilvie's Trs.*, 20 Dec. 1845, 7 D. 236; *Horsbrugh v. Horsbrugh*, 1848, 10 D. 824.

(g) *Strathmore v. Strathmore's Trs.*, 1 Feb. 1837, 15 S. 449; 1840, 1 Rob. 189.

(h) D. 872-4.

on erasure, unless fraud be averred or the record does not agree with the deed.^a CII. ix. § 101.

102. Somewhat akin to vitiation is the mutilation or partial destruction of a deed, which, however, may generally be explained by parole evidence. If an undelivered deed is found torn or mutilated in the grantor's possession, the presumption that he has cancelled it may be rebutted by parole evidence.^b The mutilation may have been accidental, or caused by the testator when of unsound mind,^c or by an unauthorised party,^d or by one having an adverse interest,^e in which cases there has been no revocation. Again, if a testamentary deed, known to have existed, cannot be found after the testator's death, the averment that it was destroyed by the testator or by his instructions may be proved by parole.^f Mutilation of undelivered deed implies revocation ; but may be explained by parole.

If, however, the deed has been delivered or has been registered, a proceeding equivalent to delivery,^g the grantor cannot revoke it by mutilation or otherwise.^h Conversely, a deed may be constructively cancelled by proof that the grantor had resolved to cancel it, but had been prevented by the improper interference of a third party.ⁱ A creditor may of course cancel his document of debt by mutilation or destruction, and the mutilation may be explained by parole evidence.^j Delivered deed not revocable by grantor.

Creditor may cancel bond by mutilation.

103. When a deed has been mutilated, destroyed, or lost, no Action of proving tenor of deeds.

(a) Act 37 & 38 Vict. c. 94, § 54.

(b) D. 901-6; *Nasmyth v. Hare*, 1821, 1 S. Ap. 65; *Bonthrone v. Ireland*, *inf.*

(c) *Laing v. Bruce*, 20 Nov. 1838, 1 D. 59; *Harris v. Berrall*, 1858, 1 Swab. & Tris. 153.

(d) *Cunningham v. Mouat's Trs.*, 16 July 1851, 13 D. 1376.

(e) *Falconer v. Stephen*, 9 Dec. 1848, 11 D. 220; 12 July 1849, 11 D. 1338.

(f) Lord Craighill and Lord Young in *Bonthrone v. Ireland*, 15 March 1883, 10 R. 786, 790.

(g) D. 948.

(h) *M^r Dowall v. M^r Ghie*, 1713, 5 B. S. 98.

(i) *Buchanan v. Paterson*, 704, M. 15,932; *Bibb v. Thomas*, 1749, 2 W. Blackst. 1043.

(j) *Thomson v. Bell*, 5 July 1850, 12 D. 1184; *Irvine v. Lang*, 6 March 1840, 2 D. 804; *Anderson's Trs. v. Webster*, 23 Oct. 1883, 11 R. 35.

II.

- CH. ix. § 103. claim can be founded upon it until its contents have been established in an action of proving its tenor, in which action parole evidence is competent.^a The Court must first be satisfied that the lost deed was originally valid, and that its disappearance or mutilation is not due to its having been properly revoked or cancelled.^b If a deed has been lost or destroyed by the fault of the opposite party, or if it only partially forms the basis of a claim, its tenor may be proved incidentally.^c
- Tenor may sometimes be proved incidentally.
- Summons of proving tenor. The summons of proving the tenor sets forth the terms of the deed, the *casus amissionis*, and the nature of the evidence to be adduced. If the writ was of transient character, or revocable, or one of those usually given up or destroyed when they have served their purpose, the presumption that it has been legitimately destroyed must be overcome by strong and clear evidence.^d But if the document was of a more permanent character, as a disposition or a marriage-contract, the averment of the *casus amissionis* need not be very strong or specific.^e Written adminicles, though once held essential,^f may be dispensed with if they are unlikely to exist, or if the deed has been improperly destroyed;^g and, conversely, written adminicles alone may suffice without oral proof.^h In accordance with the presumption *omnia rite acta*, proof of the testing-clause or that the deed was stamped is not usually required.ⁱ A decree of proving the tenor revives the document, and an extract from the decree is equivalent to an extract of a recorded deed.^j
- Proof of loss must be more or less specific.
- Parole alone, or written adminicles alone, may suffice.

(a) D. 1287-1323; *Shaw v. Shaw's Trs.*, 13 June 1876, 3 R. 813.

(b) *Winchester v. Smith*, 20 March 1863, 1 M. 685.

(c) *Wilson v. Leckie*, 1870, 7 Sc. L. R. 563; *Maxwell v. Reid*, 17 June 1863, 1 M. 932.

(d) *Bonthrone v. Ireland*, *sup.*

(e) *Winchester v. Smith*, *sup.*

(f) Stair, 4. 32. 5, 7; L. Jeffrey in *Graham v. Graham*, 1847, 10 D. 45.

(g) L. J. Clk. Inglis in *Winton v. Thomson*, 10 June 1862, 24 D. 1094; *Ritchie v. Ritchie*, 10 June 1871, 9 M. 820; *Leckie v. Leckie*, 12 July 1884, 11 R. 1089.

(h) *D. of Athole*, 1880, 7 R. 1195.

(i) Cf. § 134, *inf.*

(j) Ersk. 4. 1. 59.

104. From the general rule that documents 'of importance'^a must be either tested or holograph, certain 'privileged' writings are excepted. Foremost among these are writings *in re mercatoriâ*,^b but several others of a non-mercantile character enjoy the same privilege.^c The most important of these last are discharges for rent, feu-duties, wages,^d and probably also for interest, premiums of insurance, and other termly payments, on the ground of invariable usage. The same privilege is accorded to the awards of judicial referees or of counsel to whom parties have agreed to submit their case,^e and also to the interlocutory orders of an arbiter, but not to the submission or the decree-arbital itself,^f unless in matters of small importance, or *inter rusticos*, or *in re mercatoriâ*.^g On the other hand, while verbal submissions and decrees-arbital relating to moveables are competent, they require to be proved by the writ or oath of the party against whom they are pleaded.^h

Docquetted or 'fitted' accounts relating to business transactions, though not *in re mercatoriâ*, form another exception.ⁱ When the debtor appends to an account a docquet or memorandum admitting it to be correct, whether it be in his own writing and unsigned, or written by another hand but signed by him, or even initialled or marked with a cross, the docquet will be sustained as binding upon him.^j But the privilege does not extend to informal docquets acknowledging other liabilities.^k

Testamentary writings were formerly 'privileged' in respect that when the granter could not write they might be subscribed

CH. ix. § 104.

Exceptions to rule that important deeds must be probative.

Receipts for rent, wages, etc., privileged.

Awards of judicial referees privileged.

Docquetted accounts privileged.

Wills privileged to some extent.

(a) *Sup.* § 98.

(b) *Inf.* § 105.

(c) D. 775-80.

(d) *Stair*, 4. 42. 6; *Ersk.* 3. 2. 23; see also *Maclaren v. Howie*, 6 Nov. 1869, 8 M. 106 (discharge of legacy need not be holograph or tested).

(e) *Fraser v. Lovat*, 1850, 7 B. Ap. 171.

(f) D. 550, 559.

(g) D. 559; *Otto v. Weir*, 1871, 9 M. 660; *Dykes v. Roy*, 13 Jan. 1869, 7 M. 357.

(h) *Ferrie v. Ewing*, 1824, 3 S. (N.E.) 75; *Fraser v. Williamson*, 1773, M. 8476 & 12,417.

(i) D. 788-91; cases in M. 16,959 *et seq.*

(j) *Fell v. Rattray*, 1869, 41 J. 236.

(k) *Laidlaw v. Watson*, 27 Jan. 1844, 6 D. 530.

II.

CH. ix. § 104. for him by one notary and two witnesses, instead of by two notaries and four witnesses, as required in the case of other deeds;^a but this distinction has been abolished.^b They are still privileged, however, to this extent, that, if the granter cannot write, the minister of his parish may subscribe for him instead of a notary.^c They are also construed somewhat more liberally than other deeds,^d and are sometimes sustained in circumstances in which a contract would be set aside,^e but are not privileged in any other respect.^f

WRITINGS IN RE MERCATORIÆ.

Writings in
re mercatoriæ privi-
leged.

105. Writings *in re mercatoriæ* are binding though neither tested nor holograph; and their authenticity, if impugned, may be proved by parole evidence.^g

106. Owing to the necessities of commerce, and particularly of international transactions, writings *in re mercatoriæ* are exempted from the rule which requires 'important' documents to be either tested or holograph. When law requires a transaction to be evidenced by probative writ, an improbative writing is ineffectual, and its genuineness cannot be proved by parole evidence. But when a transaction may be competently proved by improbative writ, and the writ is impugned, its genuineness may be established by parole. This privilege is not, however, accorded to writings unconnected or only remotely connected with trade.^h While mercantile guarantees may be constituted by informal writ, probative writing is required in all other cases,

(a) Act 1579, c. 80.

(b) Act 37 & 38 Vict. c. 94, § 41.

(c) Act 1584, c. 133; D. 767-74.

(d) Ersk. 3. 2. 23.

(e) *M^cMillan v. M^cMillan*, 27 Nov. 1850, 13 D. 187; where a mutual will, written by a husband and signed by him and his wife, was sustained as the husband's deed, though not as the wife's.

(f) *Rankine v. Reid*, 7 Feb. 1849, 11 D. 543.

(g) D. 784-7; 1 Bell's Com. 325.

(h) *Hamilton's Exrs. v. Struthers*, 2 Dec. 1858, 21 D. 51; *Purvis v. Dowie*, 13 May 1869, 7 M. 764; *Stewart v. M^cCall*, 16 Feb. 1869, 7 M. 544.

except where an improbativ document has been followed by *rei interventus*.^a Writings *in re mercatoriâ* are also valid when merely initialled or signed with a cross or mark, but the genuineness of such signature must generally be proved.^b

107. Of these privileged writings the most important are bills and promissory notes,^c whether passing between merchants or not, which possess the further privileges of being negotiable and of being summarily enforceable. They enjoy their full privileges only when dated^d and signed, but are valid even when signed by the drawer with his initials or mark. The genuineness of these, however, must be proved, and such bills do not warrant summary diligence. In order to enjoy the latter privilege when one of the obligants cannot write, the bill must be authenticated by a notary and two witnesses on his behalf.^e The acceptance of a bill must be in writing, and on the document itself.^f Bills are excepted from the rule that bonds blank in the creditor's name are null,^g and the blank may be filled up by the drawer at any time before the bill is founded upon. When the drawer is dead, his heir or executor may sign the bill as his representative, but it is doubted if the bill would warrant summary diligence.^h

Bills authenticated by initials or marks only, or by a notary without witnesses, or by the granter's name written by himself in the body of the document only,ⁱ or by his name written by a mandatory whose authority requires to be proved,^j or blank in

CH. ix. § 106.

They may be signed with initials or mark.

Bills and promissory notes privileged.

Acceptance must be on bill.

Blanks must be filled up before bill is complete.

Defective bills enforceable by action only.

(a) Act 19 & 20 Vict. c. 60, § 6; *Ch. of Engl. Life and Fire Ass. Co. v. Wink*, 12 Feb. 1857, 19 D. 414; cf. §§ 110, 141-2, *inf.*

(b) *Craigie v. Scobie*, 23 March 1832, 10 S. 510; *Bryan v. Murdoch*, 1824, 3 S. 282; 1827, 2 W. & S. 568.

(c) D. 792-807; 23 Geo. III. c. 18, § 55.

(d) Act 19 & 20 Vict. c. 60, § 10; *Cameron v. Morrison*, 20 Jan. 1869, 7 M. 382.

(e) Act 37 & 38 Vict. c. 94, § 41.

(f) Act 19 & 20 Vict. c. 60, § 11; 41 Vict. c. 13.

(g) Act 1696, c. 25; *Lyon v. Butter*, 7 Dec. 1841, 4 D. 178; *Grassick v. Farquharson*, 8 July 1846, 8 D. 1073.

(h) 1 Bell's Com. 391.

(i) D. 793-5.

(j) D. 568, 571.

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CH. ix. § 107. the drawer's name,^a or undated,^b can be enforced by ordinary action only, but these various defects may be supplied by parole evidence.

Vitiation in essentials fatal, unless parties have consented.

What are essentials?

A bill vitiated *in essentialibus* after issue, and without the consent of the parties, is null;^c but if altered before issue by consent of the parties, it may be enforced by an ordinary action, in which the circumstances may be proved by parole. Among vitiations in essentials are the erasure or deletion of the name of an obligant, the addition of a new obligant, the alteration of the name of an indorsee (unless for *bonâ fide* correction of an error), and alteration of the sum, date, or term, or place of payment. On the other hand, alterations in non-essential particulars, or additions not affecting the character of the document as a bill, do not deprive it of its privileges.

IMPROBATIVE DOCUMENTS HOW VALIDATED.

108. When law requires a transaction to be evidenced by probative writ, an improbative writ is ineffectual unless validated by *rei interventus* or homologation.^d

Improbative writ not necessarily null ;

may become probative by reference.

109. Improbative writings, though not *in re mercatoriâ*, are not necessarily null. A deed, for example, which bears to be subscribed by a granter and two witnesses undesigned, though improbative, may be enforced on proof that the signatures are genuine.^e Improbative documents also become probative when imported by reference into a probative deed ; but if they be documents which the granter of the deed purposes executing at some future time, he must have expressly exempted them from the usual formalities.^f

110. When probative writ is essential to the constitution of a

(a) D. 799.

(b) *Sup.* p. 71, note d.

(c) D. 889-900 ; 1 Bell's Com. 391.

(d) D. 815-51 ; 1 Bell's Com. 328 ; Ersk. 3, 2, 3.

(e) Act 37 & 38 Vict. c. 94, § 39.

(f) *Wilsone's Trs. v. Stirling*, 13 Dec. 1861, 24 D. 163.

contract, an improbativ document, even if admittedly genuine, is inept, unless it has been followed by *rei interventus*.^a If it be alleged that a contract has been entered into by informal writ, on which *rei interventus* has followed, the writ is admissible in evidence, and if impugned may be proved by parole evidence, and the *rei interventus* may be established in the same manner. In other words, if one of the parties to an informal contract so far acts on the faith of it that he would be materially prejudiced if the other party repudiated the contract, the latter is not allowed to resile.^b Such actings, whether known to the other party or not, constitute *rei interventus*.^c

CH. ix. § 110.

Improbativ writ validated *rei interventus*.

Rei interventus defined.

Whether the actings really amount to *rei interventus*, i.e., whether *res non sunt integra*, is a question of fact to be ascertained by parole evidence in each case. Thus, an informal lease or contract of service for several years is invalid unless it has been followed by such *rei interventus* as could only be ascribed to reliance on a contract for more than one year.^d An informal lease validated *rei interventu* binds the parties and their heirs, but not singular successors, unless recorded or otherwise made known to the successor.^e *Rei interventus* may also consist in a party's abstention from proceedings which he would have taken but for his reliance on the contract.^f

Question of fact what amounts to *rei interventus*.

Rei interventus may consist in abstention.

The condition on which an improbativ writ may become evidence, and be rendered binding on the parties *rei interventu*, is that the parties have truly consented to the contract. For,

Parties must have truly

(a) *Ch. of Engl. Life & Fire Ass. Co. v. Wink*, 12 Feb. 1857, 19 D. 414; *Gibson v. Adams*, 20 Nov. 1875, 3 R. 144; *Allan v. Gilchrist*, 10 March 1875, 2 R. 587.

(b) *Forbes v. Wilson*, 22 Feb. 1873, 11 M. 454; *Bathie v. Wharncliffe*, 6 March 1873, 11 M. 490.

(c) *Johnston v. Grant*, 28 Feb. 1844, 6 D. 875; *Ch. of Engl. Life & Fire Ass. Co. v. Wink*, 17 July 1857, 19 D. 1079.

(d) *M'Rorie v. M'Whirter*, 18 Dec. 1810, F. C.; *Campbell v. Dougall*, 1813, Hume, 861; *Napier v. Dick*, 1805, Hume, 388; *Sellar v. Aiton*, 26 Jan. 1875, 2 R. 381.

(e) Act 1449, c. 18; *Stair*, 2. 9. 4; *Ersk.* 2. 6. 24, 25; *Wilson v. Mann*, 2 March 1876, 3 R. 527.

(f) *L. Fullerton in Ballantyne v. Carter*, 21 Jan. 1842, 4 D. 419; *Sutherland v. Hay*, 12 Dec. 1845, 8 D. 283.

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CH. IX. § 110. if the informality has been intentional, as where one of the parties withholds his consent by refusing to sign, or if the writ has been left blank in an essential particular, no concluded contract exists, and there is therefore nothing to validate.

consented to informal writ, otherwise nothing to validate.

Definition and effect of homologation.

Knowledge and consent of homologator essential.

Question of fact what infers homologation.

Modes of homologation.

Deed may be defective in form or voidable from grantor's partial incapacity.

III. Closely akin to the doctrine of *rei interventus* is that of homologation, or the approval, express or implied, of a defective deed by the grantor or his representative, or by some one prejudiced by the deed, whereby the deed, *quoad* the homologator and his representatives, is validated *ab initio*.^a The homologator must of course be fully aware of and consent to the deed said to be homologated, and the circumstances from which his knowledge and consent are inferred may be proved by parole evidence.^b

Whether a party's actings are such as to infer homologation is a question of fact in each case.^c The grantor of a defective deed, for example, by holding it out as effectual, or by permitting the grantee to act upon it, may be barred from afterwards impugning it; an heir may homologate an informal will, and the parties to legal proceedings may remedy defects in them by homologation.^d

The defect in the deed may arise not only from informality of execution, but from the partial or temporary disability of the grantor, and may be waived by him when the disability is removed, or by a party prejudiced by the deed. Thus, acts *ultra vires* by a factor may be homologated by his principal; ^e acts of a minor may be validated by his consent to them when major; ^f acts by a married woman may be approved of by her

(a) D. 852-70; 1 Bell's Com. 145.

(b) *Paterson v. Moncrieff*, 15 May 1866, 4 M. 706; *Murray v. Murray's Trs.*, 1826, 4 S. 374.

(c) *Crawford v. Beattie*, 12 May 1860, 22 D. 1064; *Douglas v. Douglas's Trs.*, 30 June 1859, 21 D. 1066; *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040; cases of *Paterson* and *Murray*, *sup.*

(d) *Dixon v. Knox*, 27 May 1854, 16 D. 869; *Pollock v. Ballantine*, 20 Nov. 1849, 12 D. 143; *Livingstone v. Presb. of Hamilton*, 26 June 1846, 8 D. 898.

(e) *Roberton v. Robertson*, 1831, 9 S. 865.

(f) *Forrest v. Campbell*, 4 Nov. 1853, 16 D. 16; *Linton v. Dundas*, 1729, M. 5624.

husband, or by herself in viduity ;^a and even deeds impetrated by fraud may be homologated.^b CH. IX. § 111.

On the other hand, if the writ in question is absolutely null owing to the entire incapacity of the granter, or from any other cause, such as vitiation *in substantialibus*, there exists nothing capable of being homologated ; but such a writ may afterwards be adopted by the granter or the party prejudiced, and becomes binding from the date of the adoption.^c A forged document, for example, may be adopted by the party whose signature is forged, and thus become binding upon him.^d If, however, the defective writ be one which neither statute nor common law declares null, as a vitiated document *in re mercatoriâ*, it may be homologated by the parties, and is admissible in evidence.^e Deed absolutely null may be adopted.

(a) *Grant v. Baillie*, 26 Feb. 1830, 8 S. 606 ; *Gordon v. Farquhar*, 1766, 5 B. S. 932.

(b) *Urquhart v. Bank of Scot.*, 1872, 9 Sc. L. R. 508.

(c) *Gall v. Bird*, 3 July 1855, 17 D. 1027.

(d) *Brown v. Brit. Linen Co.*, 16 May 1863, 1 M. 793.

(e) Cf. § 107, on vitiated bills, *sup.*

CHAPTER X.

*PROOF OF DELIVERY AND ACCEPTANCE OF
DOCUMENTS.*

II.

CH. X, § 112.

112. THE registration of a deed is equivalent to its delivery. Documents found in the grantor's possession are presumed undelivered; those found in the grantee's possession are presumed delivered; and these presumptions can generally be rebutted by the writ or oath of the possessor alone. When documents are found in possession of a third party, the question for whom he holds them may be determined by parole evidence, and inferences arising from the circumstances of each case may usually be overcome in the same manner.^a

General rule :
deed in-
effectual till
delivered.

In case of
wills death

113. No deed is effectual until delivered by the grantor to the grantee, either actually or constructively. When a deed is said to be effectual without delivery, what is meant is that physical delivery is sometimes unnecessary. To this class belong wills and provisions of a testamentary character, which cannot be

(a) D. 934-82; Ersk. 3. 2. 43, 44; Stair, 1. 7. 14; see also chap. xv. *inf.*

effectual while remaining in the granter's possession and revocable; but if unrevoked, they become effectual on his death, which is 'equivalent to delivery.'^a But a gratuitous *inter vivos* deed is generally ineffectual without actual delivery.^b When, on the other hand, a parent executes a deed providing for his children *inter vivos*, or is bound by contract to pay certain provisions to them, the fact that he is custodian of the deed does not prevent it from taking effect.^c Such a deed is irrevocable as soon as executed; constructive delivery has taken place; the father ceases to have power over it *quod* granter, and he becomes custodian for the grantees.

CH. X. § 113.

operates delivery.

Execution of contract is constructive delivery.

Again, if delivery be dispensed with, but a power of revocation reserved, the deed, though nominally 'effectual without delivery' is necessarily ineffectual until constructive delivery is operated by the granter's death, and such deeds therefore cannot compete with delivered deeds.^d It also seems inaccurate to say that a document which a debtor is bound to grant is effectual without delivery. The creditor may enforce the execution and delivery, but the document cannot actually be effectual till delivered.

'Delivery dispensed with' meaningless if deed revocable.

Undelivered document not truly effectual.

Lastly, in the case of mercantile or other contracts, constructive delivery to all the parties takes place as soon as the deed is complete, and it is immaterial which of the parties is the custodian.^e

Consent to contract operates delivery.

114. The registration of a deed in the public records, authorised or permitted by the granter, is equivalent to delivery, the deed being no longer revocable by him;^f and for the same reason a disposition on which the granter has

Registration equivalent to delivery.

(a) Ersk. 3. 2. 44. In *Morrison v. Morrison* (1693, 4 B. S. 40), a deed of testamentary character was found effectual after the granter's death; the case seems erroneously cited in D. 941 as one in which delivery was unnecessary.

(b) *Anderson v. Robertson*, 21 Feb. 1867, 5 M. 503.

(c) *Gilpin v. Martin*, 25 May 1869, 7 M. 807.

(d) Stair, I. 7. 14, 8.

(e) D. 944; Stair, I. 7. 14, 7.

(f) *Tennent v. Tennent's Trs.*, 1 July 1869, 7 M. 936; *Downie v. McKillop*, 5 Dec. 1843, 6 D. 180.

II.

CH. X. § 114. allowed infestment to be taken is effectual without actual delivery.^a

Document in grantor's possession presumed undelivered. If a document is found in the grantor's possession, the presumption is that it was never delivered, or that it has been returned to him in lieu of a discharge (*chirographum apud debitorem repertum præsumitur solutum*). Unless his possession is alleged to be fraudulent, this presumption can only be overcome by his writ or oath.^b The document may, however, have been returned to him for a special purpose, in which case the trust thus reposed in him must also be proved by his writ or oath.^c

Delivery presumed from grantee's possession. Conversely, a document found in the grantee's possession is presumed to have been delivered;^d but this presumption may generally be rebutted by parole evidence, whether it be averred that he obtained possession of the document fraudulently or owing to a mistake.^e

Inferences from possession by third party. 115. When a document is found in the custody of a third party, the circumstances of the case may give rise to various inferences, in accordance with which the burden of proof is determined.^f These circumstances may be proved, and the inferences from them rebutted, by parole evidence.^g The most important of these inferences may be shortly stated here.

Agent holds for principal. If the depositary be the agent, or a relation, friend, or servant of one of the parties, he is presumed to hold the deed for that party. A neutral depositary is presumed to hold an onerous deed for behoof of the grantee, but a gratuitous deed for behoof of the grantor. As already stated, the custodier of a completed contract holds the document for all the parties to it, whether he be a neutral party or not.^h The custodier of a

(a) *M'Intosh v. M'Intosh*, 28 Jan. 1812, F. C.; but see *Burnet v. Morrow*, 26 March 1864, 2 M. 929.

(b) D. 951-4; Stair, I. 7. 14, 5; *sup.* § 95, and *inf.* § 134.

(c) *Cf.* § 148, *inf.*; see, however, *Henry v. Miller*, 18 March 1884, 11 R. 713.

(d) D. 955-9; Stair, I. 7. 14, & 4, 42, 8; Ersk. 3. 2. 43.

(e) *Henry v. Miller*, *sup.*

(f) *Inf.* chap. xvi.

(g) D. 960-74; Ersk. 3. 2. 43; Bell's Pr. 23.

(h) *Sup.* § 113.

testamentary deed is presumed to hold it on behalf of the testator, and after his death for the beneficiaries under the deed.^a

When a party entitled to a document takes it in the name of a third party gratuitously, but retains possession of it, he is presumed to hold it for his own behoof; and unless it be of a testamentary nature, his death does not operate delivery.^b If, however, the document be one which he might have been compelled to grant, his death or bankruptcy operates delivery.^c Lastly, a document in custody of the grantee is presumed to have been delivered at the date it bears; but when gratuitous family provisions come into competition with the granter's debts, extrinsic proof of the date of their actual delivery is required.^d

116. Deeds which are to any extent bilateral, must be expressly accepted before they are binding on the grantee, and the acceptance may either be proved by his writ or oath or be inferred from his conduct. Such deeds are truly incomplete and improbative until duly signed by both parties in token of their consent, but the party who has omitted to sign may either admit that he has consented or signify his consent by *rei interventus*.^e On the other hand, unilateral deeds, which are binding on the granter as soon as delivered, are usually presumed to be accepted unless expressly repudiated.^f

CH. X. § 115.

Custodier of will holds for testator.

Gratuitous deed requires delivery.

Delivery of onerous deed operated by death or bankruptcy.

When date of delivery must be proved.

Proof of acceptance of deeds.

(a) L. Fullerton in *Falconer v. Stephen*, 9 Dec. 1848, 12 July 1849, 11 D. 220, 1338.

(b) *Anderson v. Robertson*, 21 Feb. 1867, 5 M. 503; *Balvaird v. Latimer*, 5 Dec. 1816, F. C.

(c) *Cormack v. Anderson*, 8 July 1829, 7 S. 868; *Moore v. Gledden*, 8 July 1869, 7 M. 1016. In *Goldie v. Aitken*, 1729, M. 7742, and other cases cited in D. 978, note *h*, the debtors held the bonds in question in trust for their creditors, actual delivery to the former having operated constructive delivery to the latter. The statement that the bonds were effectual without delivery therefore requires some qualification.

(d) D. 981-2; Stair, 1. 5. 6, 4, & 1. 7. 14, 8; Ersk. 3. 2. 43; Bell's Pr. 23.

(e) *Sup.* § 110; D. 983-6; Ersk. 3. 2. 45.

(f) Stair, 1. 10. 5.

CHAPTER XI.

PROOF OF PUBLIC DOCUMENTS.

II.

CH. xi. § 117.

117. STATEMENTS in public records and official documents, when relevant, are proved either by the document itself or by an official extract or certified copy. But extracts and copies, except when declared by statute to be evidence, must be proved correct by oral testimony.^a

Proof of statements in public documents.

118. Statements in public and official documents, when relevant, form competent evidence.^b To this part of the subject belong the rules regarding the mode of proving that such statements are truly contained in a public document.

When document cannot be produced, secondary evidence admissible.

As the primary evidence afforded by the documents themselves is rarely available, a number of rules, chiefly statutory, have been laid down with regard to the admission of secondary evidence of their contents. Some of the most important of these rules are enumerated in the following sections, but for their minuter details reference must be made to the statutes themselves.

Acts of Parliament since 1851 require no proof.

119. Public Acts of Parliament, and also the local, personal, and private Acts passed since 4th Feb. 1851, do not require to be proved, their authenticity being established by copies printed

(a) D. 1051-1286; Bell's Pr. 2208 *et seq.*; Stair, 4. 42. 10; Ersk. 4. 2. 6; Steph. Art. 73-84. See also 'Table of Statutes' in Appx., *inf.*

(b) *Sup.* §§ 60-83.

by the authority of government;^a but acts of the latter class passed before that date must, if impugned, be proved by copies sworn to have been collated with the Parliament roll.^b In practice, however, copies of such acts, and of the journals of Parliament, purporting to be printed by the printers to the Crown or to the Houses of Parliament, are usually received without objection.^c The journals of Parliament, which, strictly speaking, must be proved by examined copies, are probative of the procedure which has taken place in Parliament, but not of facts stated incidentally. The ancient *Rotuli Scotiae*, which afford evidence in questions of pedigree, must be proved by sworn copies.^d Irish statutes passed before the Union are proved by copies printed by the King's printer.^e

CH. xi. § 119.

Private acts before 1851 proved by sworn copies.

Journals of Parliament, etc.

Royal proclamations, orders in Council, and orders issued by the Treasury, the Admiralty, the Home Office, the Board of Trade, the Poor Law Board, and the Postmaster-General may be proved by copies contained in the *Gazette*, or printed by the government printer, or officially certified as correct. Such copies are probative, no evidence of the handwriting or of the official position of the certifying official being required.^f A copy of the *Gazette* is probative of all public and government transactions notified in it, but of transactions relating to individuals it affords secondary evidence only.^g

Official copies of proclamations, orders in council, etc., probative.

Foreign or colonial documents of similar character may probably be proved in the same manner, provided the copies be further certified by a notary public, a British consul, or the mayor of the town where they are made.^h In the absence of such authentication, the accuracy of copies or excerpts must be proved by summoning the custodier of the original as a witness.ⁱ

Foreign official documents how proved.

The books of the War Office, the Board of Inland Revenue, and other government offices are admissible evidence of facts and other government offices are admissible evidence of facts

Contents of books of public offices how proved.

(a) Bell's Pr. 2208; *sup.* §§ 63, 92.

(b) D. 1052, 2.

(c) Such copies are evidence in England: 8 & 9 Vict. c. 113, § 3.

(d) D. 1056-7.

(e) Act 41 Geo. III. c. 90, § 9.

(f) Act 31 & 32 Vict. c. 37.

(g) D. 1058.

(h) L. J. Clk. Hope in *Disbrow v. Mackintosh*, 27 Nov. 1852, 15 D. 123; *cf.* § 83, *sup.*

(i) *Maitland v. Maitland*, 20 March 1885, 12 R. 899.

II.

CH. xi. § 119. of which they are the proper record,^a but as extracts from them are not declared by statute to be probative, they must be proved correct by oral evidence.^b The logbook of a man-of-war and official logs kept in accordance with the provisions of the Merchant Shipping Act^c are also evidence. To the category of government documents also belong reports of the Commissioners of Woods and Forests, and printed copies of them,^d the books of the Bank of England,^e and the register of proprietors of colonial stock,^f which are evidence of the facts they record.

Judicial records and extracts from them probative. 120. Public registers and also official extracts from them, being under the care of duly qualified and responsible persons, are usually probative of those facts which it is their province to record.^g Judicial records and extracts from them, if regularly kept and duly authenticated,^h are not only probative, but generally conclusive with regard to the procedure they narrate. These records are authenticated by the signature of the presiding judge, which, however, may be adhibited *ex intervallo*.ⁱ Extracts are only probative when authenticated by the clerk of Court or other official duly appointed for the purpose.^j

How authenticated.

Extract convictions.

Essential error in pro-

In criminal cases the extract of a previous conviction is probative when *ex facie* regular, but it must be applied to the prisoner by oral evidence;^k and certified copies of the depositions on which a warrant of apprehension has proceeded are admissible in evidence.^l If there be any essential faultiness in

(a) See also § 72, *sup*.

(b) D. 1163-66; *Kay v. Roger*, 1836, 10 S. 831; *Dunbar v. Harvie*, 1820, 2 Bligh, 351.

(c) Act 17 & 18 Vict. c. 104, § 280-7.

(d) Act 36 & 37 Vict. c. 36, § 6.

(e) D. 1166, § 72, *sup*.

(f) Act 40 & 41 Vict. c. 59, § 17.

(g) D. 1060-1173, 1249-86.

(h) *L. Blantyre v. Dickson*, 3 Nov. 1885, 13 R. 116.

(i) Act 1686, c. 3; *Ferguson v. Skirving*, 2 July 1850, 12 D. 1145; 1852, 1 Macq. 232 (case of the records of a presbytery).

(j) *Carmichael v. Melville*, 1825, Sh. Just. 127; *Clark v. Thomson*, 1816, 1 Mur. 163.

(k) Act 34 & 35 Vict. c. 112, § 18.

(l) Act 6 & 7 Vict. c. 34, § 4.

II.

the procedure narrated by the record, the sentence or judgment following upon it will be recalled, and parole evidence is admissible for the purpose of proving such errors when latent.^a

So, also, an ambiguous verdict is invalid, and cannot be corrected by extrinsic evidence,^b but a verdict erroneous in point of form only may be amended.^c Clerical errors in the record or the extract may be corrected *de recenti*, much greater latitude being allowed in civil than in criminal cases.^d The Court of Session may also correct a clerical error in a judgment of the House of Lords, to the spirit of which they are bound to give effect.^e An erroneous interlocutor may be corrected of consent.^f

Somewhat akin to judicial records are the public registers already mentioned.^g These records and official extracts from them are likewise probative. Extracts from the records of chancery, kept from 1630 down to 1821, and forming an unauthorised register of retours, decrees of services of heirs, copies of Crown charters, etc., are admissible in evidence, *quantum valeant*; extracts from these records from 1821 down to 1847, when they were kept under statutory authority,^h are more trustworthy; while the present record of services,ⁱ the record of chancery for Crown writs,^j and the record of precepts,^k and extracts from them are probative.

121. A number of the following public and official registers and documents afford *prima facie* evidence only of the facts they narrate, while some of them are probative and others conclusive.^l The books of a burgh, unless challenged without undue

CII. xi. § 120.

cedure narrated invalidates judgment.

Clerical error in record or extract may be corrected.

Registers and extracts from them probative.

Extracts of services, etc.

Other official registers.

Burgh books.

(a) *Inf.* § 128.

(b) *Morgan v. Morris*, 1855, 2 Macq. 342.

(c) *Marianski v. Cairns*, 1854, 1 Macq. 766.

(d) *Cadell*, 14 Jan. 1853, 15 D. 282; *Miller v. Lindsay*, 7 June 1850, 12 D. 964; *Ritchie v. Ferguson*, 16 Nov. 1849, 12 D. 119; cf. § 128, *inf.*

(e) *Whitehead v. Galbraith*, 1861, 4 Macq. 283.

(f) A. S., 11 July 1828; *Cuthill v. Burns*, 20 March 1862, 24 D. 849.

(g) *Sup.* § 69.

(h) Act 1 & 2 Geo. IV. c. 38, § 12.

(i) Act 10 & 11 Vict. c. 47, §§ 12-14.

(j) Act 49 Geo. III. c. 42, §§ 15, 16.

(k) Act 10 & 11 Vict. c. 51, § 20.

(l) D. 1161-73, 1249-82; § 72, *sup.*

II.

CH. XI. § 121. delay, are probative of the procedure they record.^a In questions relating to the franchise the valuation roll and the register of voters also afford evidence.^b

Valuation roll evidence.
Register of copyrights, etc.

Registry of ships.

The register of copyrights and certified copies of the entries it contains are *prima facie* evidence of the proprietorship of copyrights recorded in it,^c and extracts from patents recorded in chancery are probative.^d Another important public record is the Registry of Ships,^e certified copies of which, and also certificates of registry of British ships, when signed by the proper officer, are *prima facie* evidence of the matters they narrate.^f

Extract from register of births, etc., is evidence.

Extracts from the register of births, deaths, and marriages kept since 31st Dec. 1854, duly signed by the registrar, are admissible without extrinsic proof of their accuracy,^g and extracts from the old parish registers kept before that date are usually received as *prima facie* evidence of the facts recorded.^h

Documents under Bankruptcy and Confirmation of Executors Acts.

Under the Bankruptcy Act a certified copy of the act and warrant in favour of the trustee on a bankrupt estate and deliverances signed by a judge are *prima facie* evidence;ⁱ and by the Confirmation of Executors Act the interlocutor of the commissary finding that a deceased person died domiciled in Scotland is declared to be conclusive as to the fact of domicile.^j Certified or examined copies of documents in custody of the Accountant of Court are declared by statute to be probative.^k Various documents under the Extradition and Naturalisation Acts are also admissible in evidence when properly authenticated.^l

Documents kept by Accountant of Court.

Lastly, among public documents may be mentioned the

(a) *Ogilvy v. Mags. of Edin.*, 6 Feb. 1810, F. C.

(b) See § 72, *sup.*

(c) *Sup.* § 72.

(d) Act 15 & 16 Vict. c. 83, § 18.

(e) D. 1108-25; § 70, *sup.*

(f) Act 17 & 18 Vict. c. 104, § 107; *cf.* § 70, *sup.*

(g) Act 17 & 18 Vict. c. 80, § 58; see also §§ 71, 82, *sup.*

(h) D. 1271; Ersk. 1. 7. 36; Bell's Pr. 2212-3.

(i) Act 19 & 20 Vict. c. 74, § 174.

(j) Act 21 & 22 Vict. c. 56, § 9.

(k) Act 12 & 13 Vict. c. 51, § 36.

(l) Act 33 & 34 Vict. c. 52, §§ 14, 15, 24, amended by 36 & 37 Vict. c. 60, §§ 4, 5; 33 & 34 Vict. c. 14, § 12.

minutes of the meetings of public bodies possessing a recognised *status*. Such minutes will probably be held probative when signed by the chairman, either of the meeting to which they refer or of that at which they are approved.^a The minutes of other meetings must be proved by the writer, or by some one who was present, and do not bind any one who has not signed them.^b

CH. xi. § 121.

Minutes of public bodies are evidence.

122. The register of a public company, if regularly kept, affords *primâ facie* evidence as to the shares held by the members,^c and the minute of a company's meeting regularly made under statutory authority is probative.^d Copies of the certificates of the incorporation of a company and of other documents kept by the registrar are evidence,^e and certain documents connected with life insurance companies are also admissible.^f

Authentication of registers and documents of companies.

Extracts from bankers' books are receivable as *primâ facie* evidence of the facts they narrate; but it must be proved that the books are the regular books of the bank, that the entry was regularly made, and that the copy is correct. The banker cannot be compelled to produce his books or appear as a witness in an action to which he is not a party, except on special cause shown.^g

Extracts from bankers' books require proof.

123. Extracts from registered deeds, when probative, are equivalent to the originals; and when a deed is called for, an extract will 'satisfy production.' But in actions of reduction-improbation, in which the genuineness of the original is impugned, the deed itself, unless kept in the register, must be produced,^h and, if lost, its tenor must be proved.ⁱ Extracts from foreign registers and copies of foreign official documents

Extracts satisfy production, except in improbations.

(a) D. 1199-73; *Great North. Rail. v. Inglis*, 1852, 1 Macq. 112; *L. Blantyre v. Dickson*, 3 Nov. 1885, 13 R. 116.

(b) See § 73, *sup.*

(c) See § 72, *sup.*

(d) Act 25 & 26 Vict. c. 89, § 67; *Liqrs. of City of Glasgow Bank*, 1880, 7 R. 1196, 1199.

(e) Act 40 & 41 Vict. c. 26, § 6.

(f) Act 33 & 34 Vict. c. 61, § 17.

(g) Act 42 Vict. c. 11, §§ 1-6.

(h) D. 1274-9; *Stair*, 4. 20. 21; *Ersk.* 4. 1. 2, 22; statutes cited, *sup.* § 120; *Maclean v. Maclean's Trs.*, 9 July 1861, 23 D. 1262.

(i) *Leburn v. Ferguson*, 11 Feb. 1852, 14 D. 486; *cf.* § 103, *sup.*

II.

CH. xi. § 123. are only admissible when proved by the attestation of a notary public, a British consul, or the mayor of the place to be duly authenticated by the law of the country from which they come.^a When not so authenticated, they must be proved correct by a witness who has compared them with the originals.^b If an extract is not admissible in a foreign country, the Court may authorise the original to be sent, but not if it forms part of the public records.^c

Notarial instruments probative. 124. Among other documents of a semi-public character are notarial instruments, which when signed by a notary and two witnesses, and regular in form, are probative of the facts which they narrate.^d Like other tested documents, they are null if vitiated *in substantialibus*.

Executions probative. Executions of citations, services, and diligences, when regularly executed by a messenger-at-arms or sheriff-officer, and signed by a witness, are also probative.^e Obvious irregularities in notarial instruments and executions may be pleaded by way of exception, but if latent defects be averred an action of reduction must be brought.^f Executions of criminal libels, however, may be challenged by exception on any relevant ground, there being no procedure in any criminal court analogous to reduction.

(a) *Sinclair v. Fraser*, 1771, 2 Pat. Ap. 253; *Disbrow v. Mackintosh*, 27 Nov. 1852, 15 D. 123; *Whitehead v. Thomson*, 20 March 1861, 23 D. 772.

(b) *Stiven v. Myer*, 12 Feb. and 29 May 1868, 6 M. 370, 885.

(c) *Power*, 1859, 21 D. 782; *Dunlop v. Dep. Clk. Register*, 30 Nov. 1861, 24 D. 107; *Kennedy*, 1880, 7 R. 1129.

(d) *Sup.* § 78; D. 1186-1212; M. Bell's Conv., 28 *et seq.*

(e) *Sup.* § 79; D. 1213-48.

(f) *Stewart v. Macdonald*, 20 July 1860, 22 D. 1514.

CHAPTER XII.

REDUCTION, STAMPING, INTERNATIONAL LAW.

REDUCTION OF FORMAL DOCUMENTS.

II.

125. PROBATIVE documents, unless declared by CH. xii. § 125. law to be conclusive, may generally be reduced on the ground of fraud or essential error, and these grounds of action may be proved by evidence *prout de jure*.^a

126. To the preceding chapters on the proof of documents may be added some of the principal rules as to the mode of disproving them. If a document be merely admissible *quantum valeat*, or if it affords *prima facie* evidence only, it may be impugned and set aside *ope exceptionis* or incidentally ; if it be probative, it can only be set aside by means of a separate action of reduction, except when the ground of challenge is patent, as vitiation in essentials, or when the party founding on the deed is manifestly in bad faith ;^b but if it be declared by law to be conclusive, it is irreducible.

Probative
writ how
reducible.

Reduction
unnecessary
if defect
obvious.

Among the latent grounds of nullity which may be averred in an action of reduction are that one or more of the signatures

Grounds of
reduction.

(a) D. 907-33 ; see also § 95, *sup*.

(b) *Maclean v. Colthart*, 14 March 1865, 3 M. 719 ; *Brown's Trs. v. Fraser*, 1870, 8 M. 820.

II.

CH. xii. § 126.

Their sufficiency a question of fact.

Suspicious if witness admit signature but aver irregularities.

Non memini inconclusive.

Internal evidence of spuriousness.

Alibi of party to deed may be proved.

to the deed are forged, or that one or both of the witnesses did not know the granter, or that they did not see him subscribe or hear him acknowledge his subscription. Whether the grounds averred suffice to warrant the reduction is mainly a question of fact. If the ostensible granter, or one or more of the witnesses, deny having signed the deed, it is a question of probabilities whether they are worthy of credit, or have forgotten the matter, or have been mistaken for other persons of the same name. If, however, the witnesses admit their signatures, but deny having seen the granter sign or having heard him acknowledge his subscription, their evidence is open to suspicion, although they may have signed innocently and in ignorance of the law.^a The uncorroborated statement of one witness that the legal solemnities were not observed is of course insufficient; the *non memini* of one or both witnesses is of itself inconclusive, especially after a long lapse of time; and there may even be ground for disregarding a denial of their attestations by both witnesses.^b

127. A deed may also contain internal evidence of spuriousness such as anachronisms. In one case, for example, it was proved that a map was not published until after the pretended date of writing upon it,^c and in another a fraud was detected owing to the use of a designation of a sovereign which did not apply until after the pretended date of the deed.^d The challenger of a deed may also adduce the no less direct evidence that the granter or one or both of the witnesses was absent from the country or incapacitated at the alleged date of its execution. The ostensible granter himself may of course prove that the deed is a forgery; and if he is dead or un-

(a) L. Gillies in *Cleland v. Cleland*, 15 Dec. 1838, 1 D. 254; L. J. Clk. Inglis in *Morrison v. Maclean's Trs.*, 27 Feb. 1862, 24 D. 629, and 23 Jan. 1863, 1 M. 304.

(b) Cases of *Cleland* and *Morrison*, *sup.*; L. J. Clk. Hope in *Donaldson v. Stewart*, 13 May 1842, 4 D. 1215; L. Gifford in *Smith v. Bank of Scot.*, 1824, 2 Sh. Ap. 287.

(c) *Humphreys*, 1839, Swinton's Rep. 119-20, 131 *et seq.*, 313.

(d) *Lady Ivy's Case*, 1684, 10 St. Tr. 555, 615.

II.

avoidably absent, the evidence of persons acquainted with his writing is admissible.^a CH. xii. § 127.

The indirect evidence of forgery afforded *comparatione litterarum* is generally inconclusive, as age or infirmity may have altered a handwriting with which a witness was once familiar. Still less trustworthy is the evidence of skilled witnesses called to compare the writing impugned with genuine writings of the party.^b If, however, the writings in issue be obviously or glaringly different from the genuine, the Court may form their own opinion, provided it be borne out by other evidence.^c A party challenging a deed purporting to be his own may not produce for the purpose of comparison genuine writings dated subsequently to the deed in issue,^d but his opponent is not so restricted.^e Facsimiles of genuine handwriting are inadmissible for comparison, and lithographs are of doubtful competency.^f

Comparatio litterarum
untrustworthy.

Facsimiles
inadmissible
for comparison.

The challenge of a deed may also be supported by other evidence, as that another signature besides that in issue is forged.^g In the reduction of a will it may also be important to ascertain how the testator was disposed towards his next-of-kin, whether they had access to his repositories, and whether he has recognised the deed by his subsequent actings.^h It was formerly laid down that the challenger must exhaust his direct evidence, which meant that of the granter and witnesses, before adducing indirect; but it is thought that no such rule exists, especially as the so-called indirect evidence may of itself be quite conclusive.ⁱ

Other relevant evidence
admissible.

128. As in the case of private documents, fraud and essential

(a) *Bryson v. Crawford*, 17 July 1834, 12 S. 937; *Kennedy*, 1829, Bell's Notes, 61.

(b) L. Pr. Boyle in *Turnbull v. Doods*, 29 Feb. 1844, 6 D. 901; L. Ardmillan in *Forster v. Forster*, 25 May 1869, 7 M. 797.

(c) L. Pr. Boyle in *Gellatley v. Jones*, 11 March 1851, 13 D. 961.

(d) *Ross v. Waddell*, 29 June 1837, 15 S. 1219.

(e) *Fraser & Wright*, Bell's Notes, 61.

(f) *E. of Fife v. E. of Fife's Trs.*, 1816, 1 Mur. 108; *Kingan v. Watson*, 1828, 4 Mur. 494.

(g) *Gellatley, sup.*

(h) D. 930.

(i) D. 932.

II.

CH. xii. § 128. error are the chief grounds on which probative documents of a public or official character can be reduced, but in some cases such documents are conclusive and irreducible. Acts of Parliament are of course irreducible, and certain other documents are also declared by law to be conclusive.^a

Public documents sometimes irreducible.
Judicial records conclusive, but proceedings reducible on ground of fraud, error, &c.

Judicial records are generally conclusive as to the procedure they narrate, particularly in criminal cases. If they contain any essential flaw, they cannot be amended; but the flaw may be proved by parole evidence, and the judgment following upon the procedure narrated will be set aside.^b A judgment may also be reduced on the ground of fraud, or essential error, or a denial of justice, which may be proved by parole evidence;^c and the recorded verdict of a jury may be impugned on the ground of misconduct on the part of the jury, which, however, must be proved by evidence other than that of the jurymen themselves.^d

Extracts from other public registers, being probative,^e except in improbations,^f cannot be reduced except on the ground of fraud or essential error.

STAMPING OF DOCUMENTS.

129. Documents which law requires to be stamped

(a) *Sup.* §§ 119-21.

(b) *Riddell v. Stevenson*, 1881, 8 R., Just. C., 17; *Clarkson v. Muir*, 1871, 2 Coup. 35; *M'Donagh v. Ross*, 1869, 1 Coup. 299. These cases show the *strictissimi juris* character of criminal procedure. This strictness seems, however, to be carried too far when a mere clerical error in the record, the correction of which could not possibly prejudice the prisoner, is held to invalidate a righteous conviction and to entitle the prisoner to immediate release. See L. Young in *Riddell*.

(c) *Irvine v. E. Aberdeen*, 1770, 2 Pat. Ap. 249; *Sheddan v. Patrick*, 1854, 1 Macq. 535; *Blyths v. M'Bain*, 1852, 1 Stuart, 242, 489.

(d) L. Cowan and L. Benholme in *Dobbie v. Johnston*, 19 June 1861, 23 D. 1139; *Stewart v. Fraser*, 1830, 5 Mur. 166; *Black v. Croall*, 30 Jan. 1854, 16 D. 431.

(e) *Sup.* §§ 120-4.

(f) *Sup.* § 81.

may when unstamped be used in evidence for collateral purposes and also in criminal cases.^a CH. xii. § 129.

130. In connection with the subject of proof, the question frequently arises whether any fact can be proved by means of an unstamped document which law declares to be null. The answer supplied by the authorities cited is that such a document, although null *quâ* probative instrument, so that no action or claim or defence can be founded upon it, is admissible in evidence for collateral purposes; but, as both the later and earlier cases are very conflicting, these purposes cannot be precisely defined. Most of the cases appear to treat such documents, not as absolute nullities, but merely as improvable writings, indirectly available, when supported by other evidence, as adminicles in the proof of obligations which *per se* they cannot prove.^b In this view, which seems more consistent with equity than with the strict letter of the law, an unstamped document, if acted upon by the parties to it, would probably be held validated *rei interventu*. In many cases the purpose is more clearly collateral, as that of comparing handwritings,^c or enabling a witness to refresh his memory,^d or aiding in the proof of a delict.^e Unstamped document admissible for collateral purpose; though improvable, not absolutely null.

The rule that the obligation contained in an unstamped document cannot be enforced probably applies also to colonial documents, but not to those executed in a foreign country.^f Colonial and foreign unstamped documents. If, however, that country be the *locus contractus* as well as the place of execution, and if the unstamped document be an abso-

(a) D. 987-1023; L. Chan. Cottenham and L. Brougham in *Matheson v. Ross*, 1849, 6 B. Ap. 374; Act 33 & 34 Vict. c. 97, § 17; Tilsley on Stamp Laws, 3d ed., 248-70.

(b) *Bannatyne v. Wilson*, 13 Dec. 1855, 18 D. 230; *Matheson, sup.*; *Fraser v. Bruce*, 25 Nov. 1857, 20 D. 115.

(c) *Mackenzie v. Crawford*, 25 June 1839, 1 D. 1091.

(d) *Dickson v. Taylor*, 1816, 1 Mur. 142.

(e) *Henning v. Hewatson*, 28 July 1852, 14 D. 1084.

(f) D. 1002-3; *Valery v. Scott*, 4 July 1876, 3 R. 965; *Stewart v. Gelot*, 1871, 9 M. 1057; L. Mackenzie in *Taylor v. Scott*, 16 July 1847, 9 D. 1504.

II.

CH. xii. § 130. lute nullity there, it is doubtful whether it could be founded upon in any other country.

INTERNATIONAL LAW REGARDING DOCUMENTS.

131. (1.) Conveyances of land must be executed in accordance with the *lex rei sitæ*, and that law must also decide whether property be real or personal,^a but other documents are valid if executed in conformity with the *lex loci actus*.

(2.) Contracts are valid when executed in accordance with the *lex loci contractus* or the *lex loci solutionis*, but are only enforceable in Scotland in accordance with the *lex fori*.^c

(3.) Wills are valid in Scotland if executed either in conformity with the *lex domicilii* of the testator, whether his actual or original domicile, or in accordance with the *lex loci actus*.^d

132. This subject is elaborately discussed in the principal works on private international law, but the above rules will probably suffice for guidance within the narrower limits of the law of evidence. Although a conveyance of heritage is invalid unless probative according to the law of Scotland, an obligation to convey a Scottish estate, if valid by the *lex loci actus*,
 Obligation to convey land good, if valid by *lex loci contractus*.

(a) *Downie v. Downie's Trs.*, 14 July 1866, 4 M. 1067.

(b) D. 1024-50; *Purvis's Trs. v. Purvis's Exrs.*, 23 March 1861, 23 D. 812; *Campbell's Trs. v. Campbell*, 15 July 1862, 24 D. 1321; *Boe v. Anderson*, 8 March 1862, 24 D. 732; Phillimore's Intern. Law, iv. § 627 *et seq.*

(c) D. 1035, 1039, 1044-7; *Don v. Lippmann*, 26 May 1837, 2 S. & M'L. 682; *Mackenzie v. Hall*, 12 Dec. 1854, 17 D. 164.

(d) Authorities in previous notes; 24 & 25 Vict. c. 114, §§ 1, 2; *Connel's Trs. v. Connel*, 16 March 1872, 10 M. 627.

is enforceable in this country.^a In questions of succession, when the deceased is a domiciled Scotchman, it must be ascertained by the *lex domicilii* what documents constitute his will; the question whether the documents are probative falls to be answered by the law in accordance with which he has chosen to execute them; while all questions as to the enforcement of claims and the distribution of the estate must be settled by the law of the *forum* in which they are tried. When the parties to a contract are in different countries, the *locus contractus* is the place where a unilateral obligation is undertaken, where the final consent to a bilateral contract is given, where a party accepts an offer, or where he accepts or endorses a bill. Parties may also competently contract in accordance with the *lex loci solutionis*, except apparently in the case of bills;^b but in that case, as well as in all others, the mode of enforcing the obligation is governed by the *lex fori*, or law of the place where action is raised upon it.^c

CH. xii. § 132.

Lex domicilii determines what is a will; *lex domicilii* or *loci actus* determines its form.

Contract may be according to *lex loci contractus* or *loci solutionis*.

Remedy governed by *lex fori*.

(a) *Richmond's Trs. v. Winton*, 25 Nov. 1864, 3 M. 95; *Bankes v. Bankes's Trs.*, 6 July 1882, 9 R. 1046.

(b) *Strathern v. Masterman*, 25 June 1850, 12 D. 1087; *Mackenzie v. Hall*, 12 Dec. 1854, 17 D. 164; *Stewart v. Gelot*, 19 July 1871, 9 M. 1057.

(c) *Don v. Lippmann*, *sup.*; *Don v. Kealey*, 13 June 1850, 12 D. 1016.

CHAPTER XIII.

PRESUMPTIONS AS TO DOCUMENTS.

II.
CH. xiii.
§ 133.

133. IN accordance with the presumption *omnia rite et sollemniter acta*, the accuracy of a document and the right of the custodier to possess it are presumed, unless fraud or essential error be alleged or be inferred from the circumstances.^a

Probative
deeds do not
require aid
of presump-
tion.

Date of
holograph
will pre-
sumed cor-
rect, but may
be impugned.

Deed pre-
sumed deli-
vered at its
date.

134. The general rule that a party's conduct is presumed legal until proved illegal applies also to his conduct with regard to documents ; but the presumption may be displaced by contrary inferences arising from circumstances. If a document be probative, no doubt can arise with regard to its accuracy so long as it is unchallenged on sufficient grounds, so that no presumption is required to aid in supporting it ; and, if impugned, it can only be set aside by means of an action of reduction. In the case of a holograph testament, however, a doubt may arise as to the accuracy of the date, when not guaranteed by the statutory solemnities. In the absence of proof to the contrary, the date is presumed correct,^b but its accuracy may always be impugned *ope exceptionis*. Again, although a probative *inter vivos* deed is generally presumed to have been delivered at the date it bears, the granter's creditors may require the actual date of delivery of a gratuitous deed to be proved.^c The presumption

(a) *Sup.* §§ 112-5 ; Steph. Art. 85-6.

(b) Act 37 & 38 Vict. c. 94, § 40.

(c) *Sup.* §§ 112-5, where other presumptions connected with the delivery of deeds are mentioned.

omnia rite acta also operates in favour of the pursuer of an action of proving the tenor, who is not required to prove the testing-clause and subscription by the witnesses,^a or to prove that the deed was stamped,^b unless the circumstances raise an adverse presumption. So, also, *chirographum apud debitorem repertum præsумitur solutum*; but the presumption applies to those cases only in which a debt is usually extinguished by redelivery of the document to the debtor.^c It does not, for example, apply to heritable bonds which are unlikely to be discharged without writing.^d Again, as bills and promissory notes are usually granted for value in the ordinary course of business, they are presumed to have been granted and transmitted for onerous considerations.^e

CH. xiii.
§ 134.

Presumptions
in proving
tenor.

Bond in
debtor's cus-
tody pre-
sumed paid.

Bills pre-
sumed oner-
ous.

Lastly may be mentioned the presumption in favour of business-books, when regularly kept, with regard to matters properly within their province.^f Although a party cannot generally found upon statements made by himself, a tradesman or merchant may found a claim upon his business-books provided they be supported by other evidence.^g This presumption forms one of the privileges enjoyed by writings *in re mercatoriâ*. It does not apply to accounts irregularly kept, or to private books, which are not evidence in favour of their owner, although, as admissions, they may be adduced against him.^h Private account-books may, however, be sometimes admitted in a party's favour, especially after a considerable lapse of time, and when little other evidence is obtainable.ⁱ

Business-
books pre-
sumed accu-
rate;

admissible for
owner when
supported by
evidence.

Private books
usually evi-
dence against
owner.

(a) D. 1312; *Blackwood v. Hamilton*, 1713, Rob. Ap. 211; *Ronald v. Sang*, 22 Jan. 1852, 14 D. 357; see also § 103, *sup*.

(b) D. 1005, 1314.

(c) D. 380-1.

(d) But see Ersk. 3. 4. 5; and *Rollo v. Simpson*, 1710, M. 11,411.

(e) D. 335-66; see also *inf.*, chap. xv.

(f) D. 1179-85; Ersk. 4. 2. 4; 1 Bell's Com. 331.

(g) *Halton v. Buckmaster*, 19 March 1853, 15 D. 574.

(h) D. 1183-5; *Black v. Shand's Crs.*, 16 Jan. 1823, 2 S. 118; *Couper v. Young*, 28 Nov. 1849, 12 D. 190; § 76, *sup*.

(i) L. J. Clk. Hope in *Fisher's Trs. v. Fisher*, 5 Dec. 1850, 13 D. 245, 252.

CHAPTER XIV.

MODIFICATION AND INTERPRETATION OF
DOCUMENTS BY PAROLE EVIDENCE.

II.

CH. xiv.
§ 135-
—

135. WHEN a document, whether public or private, forms the proper and necessary evidence of a fact in issue, it cannot, as a rule, unless incomplete or ambiguous, be contradicted, modified, or explained by parole evidence.^a

Exceptions
to rule.

Fraud may
be proved by
parole.

Deviations
from written
contract, if
acted upon,
may be
proved by
parole.

136. To this rule there are several important exceptions. One of these, to which allusion has already been made, is that all documents, public and private, unless declared by law to be conclusive, may be set aside by parole evidence on the ground of fraud, or essential error, or incapacity on the part of the granter.^b Again, although a verbal contract relating to land must, in order to be binding, have been followed by *rei interventus*, and must be proved by writ or oath,^c yet a verbal agreement to deviate from a written lease, if followed by *rei interventus*, may be proved by parole; but the *rei interventus* must be of a substantial character, known to and acquiesced in by the opposite party.^d If, however, the deviation were so

(a) D. 151-238; Steph. Art. 90-2; see also §§ 137-139, *inf.*, and cases there cited.

(b) *Sup.* § 95.

(c) *Allan v. Gilchrist*, 10 March 1875, 2 R. 587; *Gibson v. Adams*, 20 Nov. 1875, 3 R. 144.

(d) *Wark v. Bargaddie Coal Co.* 1859, 3 Macq. 467; *Kirkpatrick v. Allanshaw Coal Co.*, 17 Dec. 1880, 8 R. 327.

material as to constitute an entirely new contract, it is probable CH. xiv. § 136.
that the limited mode of proof only would be allowed.^a

So, also, if a contract is silent with regard to the details of the transaction, they may be supplied by parole, particularly in mercantile contracts.^b In the absence of any stipulation on the subject, it is presumed that the parties intended such details to be regulated by custom, and the custom applicable to the circumstances may be proved by parole. The custom must, however, be well known and uniform. A local custom, in order to supersede a general usage, must be of long standing and thoroughly established; and it will not bind persons from other districts, unless they knew or ought to have known it.^c

Details may be added to written contract by evidence of custom.

Custom must be well known.

On the other hand, with the exceptions stated above and in the following paragraphs, it is incompetent to prove by parole evidence that any substantially new stipulation has been added verbally to a written contract, and this rule will probably be most strictly enforced in the case of contracts relating to land.^d It is also incompetent to modify a complete written contract by proof of the previous communings of the parties.^e

New stipulations may not be added by parole.

Proof of communings excluded.

137. While, as a rule, a formal written document may not be

(a) See also *Sutherland v. Montrose Shipbuild. Co.*, 3 Feb. 1860, 22 D. 665, 671, 673.

(b) *D.* 169-70; *Merrow v. Hutchison*, 12 March 1873, 45 J. 334; *Kilpatrick v. Kilpatrick*, 27 Nov. 1841, 4 D. 109; *M'Leod v. Urquhart*, 1808, Hume, 840; see also *Welsh's Trs. v. Forbes*, 18 March 1885, 12 R. 851, where parole was admitted in support of the averment that the written acknowledgment 'I received on loan' meant 'I, for behoof of another.'

(c) *D.* 229-38; Steph. Art. 90, § 5; *Holman v. Peruv. Nitrate Co.*, 8 Feb. 1878, 5 R. 657.

(d) *Stewart v. Clark*, 4 March 1871, 9 M. 616; *Philip v. Cumming's Exrs.*, 3 June 1869, 7 M. 859; *Macgregor v. Strathallan*, 27 May 1862, 24 D. 1006; *Lang v. Bruce*, 6 July 1832, 10 S. 777; 1 Bell's Com. by M'Laren, 455-458.

(e) *Lee v. Alexander*, 3 Aug. 1883, 10 R., H. L., 91; *Inglis v. Buttery*, 12 March 1878, 5 R., H. L., 87; *L. Deas in Robertson's Trs. v. Lindsay*, 20 Dec. 1873, 1 R. 323.

II.

CH. XIV. § 137. contradicted by parole evidence,^a such evidence is admitted to prove that a written acknowledgment of marriage was not truly intended to constitute marriage.^b This exception is probably admitted, not merely on account of the peculiar importance of the contract, but on the ground that the ostensible acknowledgment may truly be fraudulent. For the latter reason it is probable that parole would be admitted, as in England, to prove a condition suspensive of a contract, as the party seeking to enforce it without fulfilment of the condition would be guilty of fraud.^c As above stated (§ 136), if essential error or misunderstanding has been the inducing cause of a written contract, it may always form the subject of oral proof,^d particularly when the parties are agreed that the document is inaccurate.^e So also parole is admissible to prove that a document bearing to be a contract was not truly intended by the parties to be a contract ;^f and an implied discharge of a probative document of debt may be proved by parole evidence of circumstances raising a presumption of discharge.^g

Essential error may be proved by parole.

Writings which require explanation.

138. Parole evidence is also admissible for the purpose of explaining peculiar words or solving ambiguities in documents.^h Technical terms, in particular, frequently require such explana-

(a) *Stewart's Trs. v. Hart*, 2 Dec. 1875, 3 R. 192; *Anderson v. Forth Mar. Ins. Co.*, 17 Jan. 1845, 7 D. 268; but see *Smith v. Kerr*, 5 June 1869, 7 M. 863.

(b) L. J. Clk. Inglis in *Fleming v. Corbet*, 24 June 1859, 21 D. 1034; *Forster v. Forster*, 25 May 1869, 7 M. 797; aff. 11 June 1872, 10 M., H. L., 68; *Maloy v. Macadam*, 9 Jan. 1885; 12 R. 431; Fraser, II. & W., 2d ed., 416.

(c) Steph. Art. 90, § 3; *Pym v. Campbell*, 1856, 25 L. J., N. S., Q. B. 277.

(d) *Scot. Union Ins. Co. v. M. Queensberry*, 10 July 1839, 1 D. 1203; *Carricks v. Saunders*, 1 March 1850, 12 D. 812.

(e) *Grant's Trs. v. Morison*, 26 Jan. 1875, 2 R. 377.

(f) *Smith v. Kerr*, *sup.*; *Clever v. Kirkman*, 1875, 33 L. J., 672, and cases there cited.

(g) *Neilson's Trs. v. Neilson's Trs.*, 17 Nov. 1883, 11 R. 119.

(h) D. 187-238; Steph. Art. 91.

tion ;^a but it is generally incompetent to prove that common, everyday words, or words with a statutory meaning, have been used in a peculiar sense,^b although it is not incompetent for the parties to declare in the document itself that they attach a peculiar meaning to such words.^c

CH. xiv. § 138.

Parole admissible to explain technical terms, but not common words.

Again, when a document is ambiguous, extrinsic proof of the circumstances in which it was executed is admissible for the purpose of showing its true meaning. In the case of a contract, the Court is entitled to have all the information which the contracting parties had, and even to be made aware of their previous communings, not for the purpose of contradicting or altering the contract, but in order to ascertain its true meaning.^d Such extrinsic aid, however, will only be resorted to in case of absolute necessity, especially if the contract be embodied in a formal and probative writ.^e In contrast with such cases are those of the class mentioned above,^f in which the contract, being complete and intelligible, required no explanation from surrounding circumstances or from previous communings.

Ambiguity explainable by parole.

139. In the next place, extrinsic evidence of the circumstances, but not of the intentions or declarations of the grantor,

Estate conveyed or grantee may be identified by parole.

(a) *Mackenzie v. Dunlop*, 1856, 3 Macq. 22 (meaning of 'iron No. 1'); *Smith v. Wilson*, 1832, 3 B. & Ad. 728 ('1000 rabbits' = 1200); *Goblet v. Beechy*, 1829, 3 Sim. 24 ('mods and bankers'); *Gorrissen v. Perrin*, 1857, 2 C. B., N. S., 681 ('bale'); *Fleming & Co. v. Airdrie Iron Co.*, 31 Jan. 1882, 9 R. 473 ('first class castings of Scotch iron of best quality'); *Dryer v. Birrell*, 8 Feb. 1883, 10 R. 585 ('no St. Lawrence').

(b) *Hunter v. Miller*, 30 May 1862, 24 D. 1011 ('fallow-break' held not technical; evidence to that effect rejected); *Thomson v. Garioch*, 25 Feb. 1841, 3 D. 625 (explanation of 'acre' excluded); but see *Hunter v. Fraser*, 13 May 1886, 23 Sc. L. R. 615 ('Whitsunday').

(c) *Robertson v. Gow*, 25 June 1858, 20 D. 1170 ('stone of 22 lbs.' means 22 lbs., not the statutory 'stone').

(d) L. Chan. Cottenham in *Forlong v. Taylor's Exrs.*, 1838, 3 S. & M'L. 177, 210; *Davidson v. Mags. of Anstruther*, 28 Jan. 1845, 7 D. 342; *N. B. Insur. Co. v. Tunnock*, 1 Nov. 1864, 3 M. 1; *sup.* p. 97, note e.

(e) *Lee v. Alexander*, 3 Aug. 1883, 10 R., H. L., 91.

(f) *Sup.* p. 97, note e; see also *Walker v. Caledon. Rail.*, 11 June 1858, 20 D. 1102.

II

CH. XIV. § 139. is admissible for the purpose of identifying the subject conveyed or the person favoured by a deed. When the description is partly accurate and partly inaccurate, the latter part of it will be disregarded, and effect given to the former, on the ground that *falsa demonstratio non nocet, dummodo constet de personâ*.^a

Evidence admissible to solve latent ambiguities ; but not to solve patent ambiguities ;

Extrinsic evidence, both of circumstances and of the grantor's declarations of intention, is admissible when the language of the deed, though clear in itself, applies equally to several different persons or objects.^b Such ambiguities are called latent, being usually undiscovered until the deed comes into operation. If, on the other hand, the ambiguity be patent, it must, if possible, be solved by the nature and context of the deed itself.

to show if legacies cumulative,

Again, when two bequests to the same effect are made in separate wills, the solution of the question whether they were intended to be cumulative or substitutional may be aided by extrinsic evidence as to the amount of the estate left by the testator and as to the relationship of the parties.^c But when a testator has left several writings of a distinctly testamentary character, no extrinsic evidence whatever is admissible for the purpose of showing that any one of them was intended not to take effect.^d

Usage best interpreter of old deeds,

Ambiguities in deeds, particularly in those of ancient date, may also be solved by evidence of the possession or usage which has followed upon them.^e

(a) *Keidler v. Thomson's Trs.* 1824, 3 S. 396 ; 1826, 4 S. 724 (legatees wrongly named, but identified by inquiry as to circumstances of case) ; *Doe v. Hiscocks*, 1839, 5 M. & W. 363 (similar case) ; *Scot. Missionary Soc. v. Home Mission Com.*, 19 Feb. 1858, 20 D. 634 (similar).

(b) D. 213-20 ; Bell's Pr. 524, 1871 ; *Morton v. Hunters*, 1830, 4 W. & S. 386 ; *Logans v. Wright*, 1831, 5 W. & S. 246 ; Steph. Art. 91, § 8 ; L. Pr. Inglis in *Ritchie v. Whish*, 19 Nov. 1880, 8 R. 101.

(c) *Horsburgh v. Horsburgh*, 12 Jan. 1847, 9 D. 329 ; L. Jeffrey, 391 ; *Koyal Infirmary v. Muir*, 16 Dec. 1881, 19 S. L. R. 249.

(d) *Wilson v. O'Leary*, 1872, 7 L. R., Chan. Ap., 448.

(e) D. 224-8 ; L. Curriehill in *L. Adv. v. Sinclair*, 21 July 1865, 3 M. 981 ; L. Ch. Sugden in *Att. Gen. v. Drummond*, 1842, 1 Dru. & War. 368.

CHAPTER XV.

LIMITATION OF PROOF TO WRIT OR OATH.

140. IN many cases, particularly those in which a II.
CII. XV. 140.
strong presumption arises in favour of a debtor owing to delay or negligence on the part of his creditor, or in which a claim is inconsistent with the ordinary course of business, an obligation can be proved by the writ or oath of the debtor or defender only.^a

141. If a creditor neglects to secure written evidence of a right, or to enforce it within a reasonable period, a presumption arises that he has abandoned it; and in some cases it may be doubted whether the alleged right ever existed. In such circumstances he is generally barred from adducing parole evidence of his claim. In certain cases parole would have been incompetent from the outset, and in others it is excluded by law as prejudicial to a debtor, who, through the creditor's neglect or delay, has been induced to regard the claim as abandoned, or who has perhaps been hitherto unaware of its existence.

The presumption which thus arises in favour of the alleged debtor can only, as a rule, be overcome by his own admission; and this admission may either be made in writing, or orally when the matter is referred to his oath, or on record. If, however, the debtor admit the existence of an obligation which law requires to be constituted by probative writ, or which the parties had agreed to commit to writing, he is at liberty to

Proof restricted where creditor's neglect would prejudice debtor.

Presumption in debtor's favour removable by his writ or oath only.

(a) D. 538-632, 335-91, 412-522; Bell's Pr. 2261-9, 586-635.

II.

CH. xv. § 141. resile, unless the informal contract has been validated *rei interventu*.

Writ need not be probative.

When proof of a fact is limited to the debtor's writ or oath, the writ is not generally required to be probative, and the writ of a duly authorised agent is usually equivalent to that of the debtor himself.^a The fact that the writ is the debtor's may be proved by parole.^b In the case of testamentary provisions, however, and obligations relating to heritage, the granter's own probative writ is indispensable.^c

Proof restricted at common law.

142. Proof is limited in certain cases to the debtor's writ or oath either at common law or by statute. To the former class belongs the settled rule that a gratuitous promise can only be proved by the writ or oath of the promiser, unless it be a promise to pay a sum not exceeding £100 Scots (£8, 6s. 8d.).^d When a marriage is alleged to have been constituted by promise *subsequente copulâ*, proof of the promise is also so limited.^e

Promises.

Obligations requiring probative writ.

Obligations regarding heritage, with the exception of leases for one year, must also be proved by writ or oath; but, when proved by oath or by improbate writ, they are not binding unless they have been followed by *rei interventus*; and the same rule applies to other obligations which law requires to be constituted by probative writ.^f Akin to informal obligations regarding heritage are verbal contracts of service, which, if for more than one year, are not binding unless followed by *rei interventus* and proved by writ or oath.^g

Contracts of service.

Verbal submissions.

Verbal submissions and decrees-arbitral concerning moveables must also be proved by writ or oath, except in matters of small importance,^h and the same restriction obtains with regard

Innominate contracts.

to innominate contracts when of an unusual or anomalous

(a) D. 542, 582-3, 449, 451, 504, 513; see also *inf.* p. 105, note d.

(b) *Johnston v. Scott*, 18 Jan. 1860, 22 D. 393.

(c) *Logan v. Logans*, 27 Feb. 1823, 2 S. 253 (222); *Scot. Lands & Build. Co. v. Shaw*, 13 May 1880, 7 R. 756.

(d) D. 595, 593.

(e) D. 541; 1 Fraser, H. & W., 2d ed., 386.

(f) D. 548; cf. §§ 108-10, 141, *sup.*

(g) *Sup.* § 110.

(h) D. 559; cf. § 104, *sup.* A compromise, however, may be proved *prout de jure*: *Love v. Marshall*, 12 June 1872, 10 M. 795.

character.^a Among such contracts has been reckoned an agreement by a law-agent to conduct a case gratuitously, unless he can recover costs from the opposite party, but the restriction does not apply to similar contracts with other agents.^b In the same category may also be reckoned an agreement to bear a share of the rent and expenses of a shooting.^c On the other hand, a contract may be innominate without being unusual, in which case it may, like mandate,^d or a bargain concerning moveables,^e be proved by parole evidence.

CH. xv. § 142.

Gratuitous services of law-agent.

143. It has been laid down that donation must be proved by writ or oath;^f but this rule cannot now be stated so broadly, and it seems only to apply to cases in which the circumstances raise an opposite presumption. The later cases recognise that, where such writ exists or such delivery has taken place as is not inconsistent with donation, the *animus donandi* may be proved by parole evidence.^g Similarly, when a creditor is alleged

Donation.

(a) D. 562; *Edmonston v. Edmonston*, 7 June 1861, 23 D. 995; *Forbes v. Caird*, 20 July 1877, 4 R. 1141; L. Shand in *Downie v. Black*, 5 Dec. 1885, 13 R. 273.

(b) *Moscip v. O'Hara*, 23 Oct. 1880, 8 R. 36; *Taylor v. Forbes*, 13 Jan. 1853, rep. 4 D. 19. The existence of so strong a presumption in favour of law-agents seems inequitable, and the value of the case of *Taylor* as a precedent is doubted.

(c) *Stewart & Craig v. Philips*, 2 Feb. 1882, 9 R. 501.

(d) *Downie v. Black*, *sup.*; *Bonthrone v. Ireland*, 15 March 1883, 10 R. 779; L. Cowan in *Mackenzie v. Brodie*, 24 June 1859, 21 D. 1051.

(e) Act 1669, c. 9, incidentally declaring the common law.

(f) *Robertson v. Robertson*, 9 Jan. 1858, 20 D. 571; contrast with *Thomson v. Geekie*, 6 March 1861, 23 D. 693, where the terms of the writ in question were not such as clearly to raise a presumption against donation.

(g) *Crosbie's Trs. v. Wright*, 28 May 1880, 7 R. 823; *Thomson's Exr. v. Thomson*, 8 June 1882, 9 R. 911. Although these were cases of *donatio mortis causâ*, the same rule applies in cases of *donatio inter vivos*; but the presumption against the latter is usually stronger than against the former kind of donation, while in certain cases the presumption is rather in favour of donation than against it. See also L. Cowan in *Mackenzie v. Brodie*, 24 June 1859, 21 D. 1051; *Sharp v. Paton*, 21 June 1883, 10 R. 1000; and *cf.* § 159 *inf.*, and cases there cited.

II.

CH. XV. § 143. to have presented a document of debt to the debtor, or to have destroyed it, with a view to making a gift to the debtor, the circumstances may be proved by parole.^a

Loan. A loan of money exceeding £100 Scots must be proved by the debtor's writ or oath.^b The writ must be an acknowledgment by the debtor to the creditor. The debtor's indorsation of the creditor's cheque is not a sufficient acknowledgment, being a mere voucher to the bank.^c But if the creditor produce a sufficient writ, the debtor is presumed to have received the money as a loan, and must repay it, unless he rebut that presumption, which he may competently do by parole proof of facts and circumstances.^d Proof of a discharge is

Discharges. generally restricted in the same manner;^e but the rule would probably be relaxed in a case of payment of wages, for which written receipts are not usually taken.^f Nor is the proof restricted when the obligation is *ad factum præstandum*, and not merely to pay a sum of money.^g So, also, the renunciation of a right constituted by writing must be proved by writ or oath, but circumstances inferring consent to renounce may be proved by parole.^h

Renunciations.

(a) *Anderson's Trs. v. Webster*, 23 Oct. 1883, 11 R. 35.

(b) D. 592; *Gow's Exrs. v. Sim*, 15 March 1866, 4 M. 578; L. Deas and L. Shand in *Williamson v. Allan*, 29 May 1882, 9 R. 859; L. J. Clk. Moncreiff in *M'Adie v. M'Adie's Exec.*, 9 May 1883, 10 R. 741; *Annand's Trs. v. Annand*, 6 Feb. 1869, 7 M. 526.

(c) *Haldane v. Speirs*, 7 March 1872, 10 M. 537. But such indorsation proves receipt of the money by the indorser, and has been held to instruct loan when forming part of a series of transactions between agent and client (*Robb v. Robb's Trs.*, 4 June 1884, 11 R. 881).

(d) L. Cowan in *Haldane*, p. 543; L. Deas, pp. 546, 548; *Christie's Trs. v. Muirhead*, 1 Feb. 1870, 8 M. 461; see also *Welsh's Trs. v. Forbes*, 18 March 1885, 12 R. 851. With regard to the analogous presumption against donation, see *sup.*, and § 159, *inf.*

(e) D. 606-13; *White v. Arthur*, 4 June 1864, 2 M. 1154; *Shaw v. Wright*, 23 Nov. 1877, 5 R. 245; *MacKenzie v. Brodie*, *sup.* The writ need not be probative: *M'Laren v. Howie*, 6 Nov. 1869, 8 M. 106.

(f) L. Deas in *Brown v. Mason*, 1, 6 Dec. 1856, 19 D. 137; and in *Annand's Trs. v. Annand*, *sup.*

(g) D. 607.

(h) D. 624-6; see also *Wark v. Bargaddie Coal Co.*, 1859, 3 Macq. 467; cf. § 136, *sup.*

If, however, the obligation has been constituted by parole, and relates to a sum not exceeding £100 Scots, its discharge may be proved by parole.^a A nuncupative legacy of a sum not exceeding £100 Scots may be proved by parole, but one of a larger sum by the writ or oath of the executor only.^b A writing bearing to be of testamentary character, but unsigned, is in the same position as a nuncupative legacy; and the intention of the testator that it should receive effect as his will cannot be proved by parole evidence.^c Such a writing may, however, be expressly referred to and declared to be of testamentary validity by another writ signed by the testator, in which case it will receive effect.^d

144. The presumption that bills and promissory notes, as they are usually granted and transmitted as *bonâ fide* documents of debt, have come into the hands of the payee or indorsee or holder for an onerous consideration, may now be overcome by parole evidence.^e But while the Bills of Exchange Act of 1882 admits parole evidence generally to prove any fact relating to questions of liability on bills, cheques, or promissory notes, it expressly requires the renunciation of a bill to be proved by writ.^f So, too, the discharge of a bill or note, when not in possession of the debtor, must still be proved by writ or oath; if a discharge has been granted, parole will not be admitted to contradict its terms; and when a bill has been noted and protested the only competent evidence is the written instrument of protest.^g The Act does not apply to bills which have undergone the sexennial prescription.^h

CH. XV. § 143.
Nuncupative legacies.

Presumption of onerosity of bills now overcome by parole.

Proof still limited in certain cases.

145. When an obligatory document is found in possession

Presumption that deed in

(a) D. 611.

(b) D. 629.

(c) *Goldie v. Shedden*, 4 Nov. 1885, 13 R. 138; *Skinner v. Forbes*, 15 Nov. 1883, 11 R. 88.

(d) *Russell's Trs. v. Henderson*, 11 Dec. 1883, 11 R. 283.

(e) Act 45 & 46 Vict. c. 61 (Bills of Exch. Act, 1882), § 100. For the older rule see D. 335, 347-8, 352; also 1st ed. of the present work § 144.

(f) Bills of Exch. Act, § 62.

(g) Thorburn on Bills of Exch. Act, pp. 217-225.

(h) Bills of Exch. Act, § 100; see *inf.*, § 147.

II.

CH. xv. § 145. of the granter, the presumption arises, either that it has never been delivered, or that it has been returned to him in lieu of a discharge (*chirographum apud debitorem repertum præsumitur solutum*),^a and this presumption can only be rebutted by his writ or oath, except when fraud is averred.^b So also presumption that deed in grantee's hands is delivered. Conversely, the presumption that a document found in the grantee's possession has been duly delivered can, in accordance with the strict rule, be rebutted by his writ or oath only;^c but fraud, suspicious circumstances, or even an averment that the grantee got possession by mistake will render parole admissible.^d

Presumption as to will held by third party, how rebutted; granter's life, and for the parties favoured by the deed after the granter's death; and it is probable that this presumption also can only be overcome by the granter's writ or oath, or by the writ or oath of the beneficiaries to whom the granter's death has operated delivery.^e On the other hand, if it be averred that the custodier has disregarded the granter's instructions, and has improperly destroyed or omitted to destroy the deed, such averments may be proved by parole.^f So also, the presumption that a will which cannot be found has been destroyed by the testator, or by his instructions, may be rebutted

as to missing will.

(a) *Sup.* §§ 112-5.

(b) D. 951-4; see, however, *Henry v. Miller, inf.*, which indicates that even an averment of mistake would suffice to let in parole.

(c) D. 955-9.

(d) *M'Aslan v. Glen*, 17 Feb. 1859, 21 D. 511; *Henry v. Miller*, 18 March 1884, 11 R. 713.

(e) D. 971-4; *sup.* § 115; *Logan v. Logans*, 27 Feb. 1823, 2 S. 253, in which an improbativ writ of the granter was held insufficient to overcome the presumption; see, however, L. Fullerton in *Falconer v. Stephen* (9 Dec. 1848, 11 D. 220; 12 July 1849, 11 D. 1338), who does not seem so to limit the proof.

(f) See *Anderson v. Boyd*, 1827, 5 S. 927; *Leckie v. Leckie*, 12 July 1884, 11 R. 1089.

by parole evidence,^a such evidence being admissible to prove the act of physical destruction by the testator, or to prove his mandate to destroy it, or to prove its fraudulent destruction by others. CH. xv. § 145.

146. Besides the above cases, there are several others in which the proof of a claim is limited by statute to the writ or oath of the debtor :^b that is, where the creditor's claim has 'prescribed' owing to his neglect or delay in prosecuting it, and where the debtor's admission alone can save it from extinction. Proof restricted by statute to writ or oath. The admission may be contained in writing, formal or informal, or in the record, or it may be made orally on reference to the debtor's oath ; but it must be taken in conjunction with its qualifications, so far as intrinsic to or inseparable from it.

Of these 'prescriptions,' which are statutory defences conferred upon debtors, or statutory limitations of proof imposed upon creditors, and which do not absolutely extinguish the rights falling under them, the oldest and probably most important is the triennial.^c The statute requires that 'all actions for house-malls, men's ordinars, servants' fees, merchants' compts, and other the like debts,^d that are not founded upon written obligations, be pursued within three years ; otherwise the creditor shall have no action, except he either prove by writ or by oath of his party.' In the case of wages and rents each term runs a separate course ; in the case of accounts, if the last item is within the three years, the whole account is saved.^e After the three years, unless the debt has been saved from the operation of the statute by action or judicial procedure taken previously, both its constitution and subsistence must be proved by the debtor's writ or oath ; but once so saved or proved, the debt becomes subject to the forty years' prescription only. The writ need not be probative, or refer expressly to the debt, but must, in order to prove the subsistence of the claim, be dated after the three years,^f and the writ of a person authorised to bind the

Triennial prescription.
Interruption.
Writ may be improbativ ; must be dated after the three years.

(a) L. Craighill and L. Young in *Bonthrone v. Ireland*, 15 March 1883, 10 R. 786, 790. (b) D. 412-522 ; Bell's Pr. 586-635.

(c) D. 476-522 ; Act 1579, c. 83.

(d) Such as writers', factors', engineers', surveyors', clerks' accounts, etc., if in the ordinary course of their employment (Bell's Pr. 629).

(e) Bell's Pr. 629-631. (f) D. 447 ; 1 Bell's Com. by M'Laren, 348-350.

II.

CH. xv. § 146. debtor will suffice ;^a but the oath of the manager of a party's business is not equivalent to the 'oath of the party' himself, as required by the statute.^b If the creditor stake his case on the defender's oath, he cannot afterwards fall back on his writ.^c A general denial of resting-owing by the defender may, unless supported by satisfactory reasons, be taken as an admission.^d

Intrinsic qualification of oath ; If the defender admits the constitution of the debt, but depones that the creditor agreed to discharge it for a certain consideration, the intrinsic qualification of the admission neutralises its effect, and the oath is negative of the subsistence of the debt.^e On the other hand, if the debtor depone that the debt has been extinguished by transaction under a written

extrinsic. contract or other document, the writing, which is extrinsic to the allegation of extinction of the debt, must be produced and its effect determined by the Court.^f So also, if the defender admit that a debt exists, without stating its amount, or if he aver overcharge, the subsistence of the debt will be held proved by his admission, and the amount may be proved by parole.^g A plea of compensation will also be taken as an admission, the *onus* of proving that plea being then thrown upon the debtor.^h The statute introduces no presumption of payment.ⁱ

Where original debtor dead.

Where the original debtor is dead, the constitution and resting-owing of the debt can only be proved by the writ or oath of his representative, but neither of these parties when pleading the statute need aver payment.^j

(a) *M'Gregor v. M'Gregor*, 27 June 1860, 22 D. 1264; *cf.* § 45, note i.

(b) *Bertram v. Stewart's Trs.*, 19 Dec. 1874, 2 R. 255; *cf.* § 199.

(c) *Meyer & Mortimer v. Lennard*, 25 Nov. 1851, 14 D. 99.

(d) D. 454, 455, and cases there cited; see also *inf.*, §§ 202, 203; *Fenning v. Meldrum*, 17 Nov. 1876, 4 R. 148.

(e) *Cowbrough v. Robertson*, 18 July 1879, 6 R. 1301; *Meyer, sup.*

(f) D. 456.

(g) *Stevenson v. Kyle*, 13 Feb. 1850, 12 D. 673; *Fife v. Innes*, 17 Nov. 1860, 23 D. 30.

(h) D. 458.

(i) *Cullen v. Smeal, inf.*

(j) *Cullen v. Smeal*, 12 July 1853, 15 D. 868. With regard to the construction of an oath on reference, see chap. xx. *inf.*

147. Most of the above remarks apply also to the quinquennial prescription of ministers' stipends, multure, maills and duties, and verbal obligations concerning moveables,^a and to the sexennial prescription of bills and promissory notes.^b In the last-mentioned case the statute extinguishes the bill as a document of debt, if it has not been retired or sued on within the six years; and if the bill has thus been extinguished, the debt must be proved by other habile evidence. The statute applies to all bills and notes (except bank-notes), whether foreign or inland, and whether payable in this country or abroad,^c but not to claims of relief arising out of them.^d Prescription runs 'from and after the terms at which the sums in the said bills or notes are exigible.' The only competent mode of interrupting prescription is by raising and executing diligence or commencing action on the bill within the six years. After the expiration of the six years the debt, unless constituted by an independent obligation, must be proved either by oath or by writ subsequent in date to their expiration.^e As in the case of the triennial prescription, such writ may be informal, and may refer to the debt by implication only.^f After the six years, although the bill is extinguished as a ground of action, the debt for which it was granted may still subsist, subject only to the forty years' prescription;^g and in an action for recovery of the debt the bill may be libelled on, but merely *descriptione*.^h

The rules as to proof of claims which have fallen under the vicennial prescription of holograph writs are similar to those above stated.ⁱ While the statute introducing the sexennial

(a) Act 1669, c. 9; D. 464-75.

(b) Act 1772, 12 Geo. III., c. 72, §§ 37-40; D. 424-63; Bell's Pr. 594-599.

(c) *Don v. Lippmann*, 26 May 1837, 2 S. & M'L. 682.

(d) Bell's Pr., § 597.

(e) *Blair v. Horn*, 30 Nov. 1858, 21 D. 45; *Easton v. Hinshaw*, 16 Oct. 1873, 1 R. 23.

(f) *Wood v. Howden*, 7 Feb. 1843, 5 D. 507; *Ferguson v. Bethune*, 7 March 1811, F. C.

(g) *Drummond v. Lees*, 10 Jan. 1880, 7 R. 452.

(h) Bell's Pr. 596.

(i) Act 1669, c. 9; D. 412-23.

II.

CH. xv. § 147. prescription presumes that the bill (which must, of course, not be confounded with the debt in the bill) has been paid within the six years, and extinguishes it as a document of debt, there is no such presumption in the case of the triennial and vicennial limitations. While, therefore, the lapse of twenty years destroys the validity of a holograph writ, it does not absolutely extinguish it, and its efficacy will be restored by the debtor's admission that the writ and subscription are genuine.^a

No presumption of payment introduced.

Proof of trust limited by statute to writ or oath. 148. When a written conveyance of property, heritable or moveable, is *ex facie* absolute, proof that the property is held in trust is limited by statute to the writ or oath of the trustee.^b The act, however, does not apply to trusts regarding moveable estate, verbally constituted, or to writings *in re mercatoriâ*; and the restriction applies only to questions between the trustee or a party representing him and the alleged truster.^c If no trust has been reposed in the party sued, or if a trust has arisen from his own act, the circumstances may be proved by parole.^d The writ of the trustee's agent is not equivalent to that of the trustee himself.^e

Writ of agent not writ of party.

What constitutes trustee's writ.

Strictly speaking, the writ must be 'lawfully subscribed' by the trustee, but holograph entries by a trustee in his account books, explained by letters written to him by the truster, have been sustained although unsubscribed.^f There is, of course, no limitation of the mode of proof if the alleged trust is alleged to be fraudulent or illegal.^g

(a) D. 422; Ersk. 4, 2, 11.

(b) Act 1696, c. 25; D. 572-86; Bell's Pr. 1995.

(c) *Middleton v. Rutherglen*, 8 Feb. 1861, 23 D. 526.

(d) L. J. Clk. Inglis in *Marshall, inf.*; *Horne v. Morrison*, 1877, 4 R. 977.

(e) *Marshall v. Lyell*, 18 Feb. 1859, 21 D. 514.

(f) *Thomson v. Lindsay*, 28 Oct. 1873, 1 R. 65.

(g) *Wink v. Speirs*, 3 Dec. 1867, 6 M. 77; see also L. Deas in *Univ. of Aberdeen v. Mags. of Aberdeen*, 18 July 1876, 3 R. 1087, 1103.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.



CHAPTER XVI.

BURDEN OF PROOF.

III.

149. THE party who seeks to enforce a right must CH. xvi. § 149. prove the existence of the facts upon which it depends; and the burden of proof lies primarily on that party against whom judgment would be pronounced in the absence of evidence on either side. But when proved or admitted facts raise a presumption in favour of one of the parties, the burden of rebutting it lies upon his opponent.^a

150. As he who affirms must generally prove, a pursuer must prove the averments on which he founds his claim, and the defender those on which he bases his defence. On the other hand, he who denies is in a somewhat more favourable position (*præsumitur pro negante*), as it is often difficult or impossible to prove a negative, while the party maintaining the affirmative ought to be able to establish it. But if the party maintaining the negative fails to explain facts inconsistent with his aver-

Party must
prove own
averments.

(a) D. 1-16; Steph. Art. 93-7.

III.

CH. xvi. § 150. ment, or is proved to be professing ignorance of facts which he cannot but know, the *onus* of proving his case is transferred to him. If one of the parties establishes a *prima facie* case by proving facts which raise a presumption in his favour, the *onus* of overcoming the presumption will then be transferred to his opponent.^a In many cases presumptions are established by law,^b and the *onus* of rebutting them is laid on a particular person.^c The *onus* may therefore frequently be shifted in the course of a proof or trial, according as one or other of the parties is required to prove a fact essential to his case, or to overcome a presumption which has been raised against him. If the facts give rise to no legal presumption, the Court must determine in each case whether the amount of evidence be sufficient to shift the burden of proof.

Examples of shifting of *onus*;

in right of way case;

in questions of domicile, etc.

Onus in reduction of deeds;

151. When, for example, the proprietor of an estate raises a declarator that there is no public right of way across it, he establishes a *prima facie* case by producing his title-deeds, and thereby throws upon the defenders the *onus* of proving the existence of the alleged right.^d Again, in a question as to the settlement of a pauper, when it is proved that he was born in a certain parish, that parish must prove that he acquired a new settlement elsewhere, in order to rebut the presumption that he has retained his birth-settlement.^e Similarly, in questions of domicile, the party alleging that a person has changed his original domicile is required to prove it.^f

If a party seeks to reduce a deed which is *ex facie* regular, he must overcome the presumption *omnia rite et sollemniter acta* by proving that it was impetrated by fraud, or was not truly

(a) *Williams v. Dobbie*, 27 June 1884, 11 R. 982.

(b) The presumption, *e.g.*, that what is 'notorious' in a given locality must be known to a publican there (*Maxwell v. Malcolm*, 1879, 4 Coup. 289); but if the publican proves that he is a new-comer, the presumption against him would probably be held as rebutted.

(c) *Cf.* chap. xvii. *inf.*

(d) *Barings v. M'Queen*, 1 March 1853, 15 D. 455; *Davidson v. E. of Fife*, 5 June 1863, 1 M. 874.

(e) *Allan v. Burton*, 8 Feb. 1868, 6 M. 358.

(f) *L. Wensleydale in Aikman v. Aikman*, 1861, 3 Macq. 877.

executed by the granter ; while, if a document be irregular in form, the *onus* of proving that it is truly the granter's deed lies on the party founding upon it.^a So, also, the presumption in favour of legitimacy must be overcome by the party alleging that a person is illegitimate ;^b but if an alleged bastard admit that his parents were not regularly married, though averring that they were habit and repute married persons, the presumption is overcome by his admission, and he must discharge the *onus* of proving his averment.^c

CH. xvi. § 151.
—
in question of legitimacy ;

Again, if a law-agent founds on a deed granted in his favour by his client, he is required to overcome the presumption that he has obtained it by the exercise of undue influence.^d Lastly may be mentioned the presumption of guilt arising from the recent possession of stolen goods, which the accused is required to rebut by explaining how they came into his hands.^e

in case of deed by client in favour of agent ;
in cases of theft.

(a) Act 37 & 38 Vict. c. 94, § 39 ; *Douglas v. Douglas's Trs.*, 20 July 1864, 2 M. 1389 ; *Anderson v. Gill*, 25 June 1850, rep. 20 D. 1326 ; 16 April 1858, 20 D., H. L., 7.

(b) *Campbell v. Campbell*, 26 June 1866, 4 M. 867 ; 1867, 5 M., H. L., 115.

(c) *Swinton v. Swinton*, 20 March 1862, 24 D. 833.

(d) *Grieve v. Cunningham*, 17 Dec. 1869, 8 M. 317 ; *Cleland v. Morrison*, 9 Nov. 1878, 6 R. 156.

(e) 1 Hume, 111 ; D. 334.

CHAPTER XVII.

LEGAL PRESUMPTIONS.

III.

CH. xvii.

§ 152.

152. A LEGAL presumption, or the inference which law requires to be drawn from certain facts, may be rebutted ; but in the absence of proof to the contrary, the presumed fact is held to be conclusively proved.^a

*Præsum-
tiones juris.*

They fix bur-
den of proof.

Other pre-
sumptions.

Presumption
in favour of
ordinary

153. In other words, a party who adduces *primâ facie* evidence in his favour, *i.e.* distinct and satisfactory evidence, though not absolutely conclusive, will, as a rule, be entitled to maintain his position until the presumption thus raised in his favour has been rebutted. A number of legal presumptions have already been mentioned in previous sections, the most important being those which cannot be rebutted except by the writ or oath of the party in whose favour they arise.^b Somewhat less weighty are those which may be rebutted by parole evidence, but they are important as determining the burden of proof ; and it is of these chiefly that the present chapter treats. Numerous other inferences, or 'presumptions of fact,' usually arise in the course of every investigation, whether civil or criminal, and must be rebutted by the party to whom they are unfavourable. Such inferences differ from legal presumptions in this respect only, that no rule exists requiring the Court to draw them from certain facts, and that no *nomina juris* are applicable to them. Generally, in the absence of evidence to the contrary, there is a presumption in favour of the ordinary course of nature, in favour of innocence, honesty, justice, sanity, and of the rea-

(a) D. 292-400 ; Stair, 4. 45. 9-24 ; Steph. Art. 98-105 ; *sup.* § 8 ; Trayner's Maxims, '*Præsumptio*,' etc.

(b) *Sup.* chap. xv.

sonableness and regularity of human transactions; but, as already mentioned,^a if there be sufficient evidence to the contrary, the presumption may be displaced or even reversed. Some of the most important *præsumptiones juris* will now be enumerated.

154. One of the phases of the general presumption just mentioned is, *Omnia præsumuntur rite et sollemniter acta*, which applies in a great variety of cases in which a minute inquiry into details would be impracticable. It applies, for example, to judicial records when *ex facie* regular and only impugned *ex intervallo*; ^b it exempts the pursuer of an action of proving the tenor from proving the stamp and the testing-clause; ^c and it protects against challenge deeds executed by official persons who were reputed to have been duly appointed.^d Somewhat analogous is the presumption, *Probatis extremis præsumuntur probatis media*,^e but this is not necessarily a legal presumption.^f

When the commission of a crime is in issue, whether in a criminal trial or in a civil action, the accused is presumed innocent until he is proved guilty, or until the evidence raises a contrary presumption which he fails to rebut.^g If, for example, an accident occur in a factory from an unascertained cause, the mere fact of its occurrence will not displace the presumption that the owner has kept the machinery in proper order.^h

At common law a presumption in favour of life exists with regard to persons who have disappeared, until in the opinion of the Court it has been overcome by circumstances, such as lapse of time, the feeble health or the perilous occupation of the absentee, or evidence of a disaster in which he is reasonably believed to have perished.ⁱ In certain cases the duration of the presumption is now limited.

(a) *Sup.* § 150.

(b) *Cf.* § 120, *sup.*

(c) *Sup.* § 103.

(d) *Sup.* §§ 26, 78-9.

(e) *Stair*, 4. 45. 17.

(f) *Cf. inf.* § 155: filiation cases.

(g) D. 293 (6); *L. Young in Bonthrone v. Ireland*, 15 March 1883, 10 R. 790; see also §§ 15, 156, as to presumption from possession of stolen goods.

(h) *Macfarlane v. Thompson*, 6 Dec. 1884, 12 R. 232.

(i) D. 299-311; *Fife v. Fife*, 16 June 1855, 17 D. 951; *Barstow v. Cook*, 14 March 1862, 24 D. 790.

III.

CH. xvii.
§ 154.Sanity and
legitimacy.*Pater est
quem nuptiæ
demonstrant.*Presumption
in filiation
cases.Presumption
of marriage.

tion of this presumption is now limited by statute to seven years from the time when the absentee was last seen or heard of.^a

Similar presumptions also exist in favour of sanity and legitimacy.^b

155. Akin to the last of these is the presumption, *Pater est quem nuptiæ demonstrant*, which applies to children born at least six calendar months after the mother began to cohabit with her husband, or at most ten calendar months after the time when she ceased to cohabit with him.^c This presumption may be overcome by proof of physical impossibility of access on the part of the husband, and even by proof of physical or moral improbability, when borne out by circumstances corroborating the improbability;^d but it will not be overcome by the declaration of the spouses themselves, unless made within a reasonable time, and supported by other evidence.^e A somewhat similar, but not a legal presumption exists in filiation cases. If the mother's intercourse with the defender within the period of gestation, coupled with opportunity about the period of conception, be proved or admitted, a presumption arises that the defender is the father, and cannot easily be rebutted.^f But a slight inference only arises from proof of intercourse at too short^g or at too long^h a period before the birth.

There exists also a presumption that persons cohabiting as man and wife, and reputed to be such, are truly married.ⁱ

(a) Act 44 & 45 Vict. c. 47, §§ 1, 8; *Rainham*, 2 Dec. 1881, 19 S. L. R. 167; *Craig*, 20 Jan. 1882, 9 R. 434.

(b) Cf. §§ 151, 153, *sup.*

(c) D. 312-26; Fraser, P. & C., 2d ed., p. 1 *et seq.*

(d) *Brodie v. Dyce*, 29 Nov. 1872, 11 M. 142.

(e) *Gardner v. Gardner*, 30 May 1876, 3 R., 695; 1877, 4 R., H. L., 56.

(f) *Ross v. Fraser*, 13 May 1863, 1 M. 783; *McDonald v. Glass*, 27 Oct. 1883, 11 R. 57.

(g) *Ritchie v. Cunninghame*, 12 Nov. 1857, 20 D. 35.

(h) *Henderson v. Somers*, 7 July 1876, 3 R. 997.

(i) L. Chan. Cairns in *De Thoren v. Wall*, 1876, 3 R., H. L., 28.

156. The maxim, *In pari casu melior est conditio possidentis*, forms another expression of the general presumption in favour of the honesty and regularity of ordinary transactions; but this presumption may be overcome by evidence, or may be displaced by an opposite presumption arising from circumstances.^a The ownership of moveables, for example, is usually presumed from their possession; but if the custodier be a goods-agent, carrier, or depositary, this presumption is displaced.^b And, if the moveables have been very recently stolen, their possession raises a presumption that it is unlawful; and if that presumption be not rebutted, it will generally be strengthened into a *præsumptio juris et de jure*, or conclusive proof that the possessor is a thief or resetter.^c

Another presumption of this class arises from the possession of lands by a churchman as part of his benefice for thirteen years. Such possession, though without a written title, creates a presumptive title in his favour.^d

On similar grounds the uninterrupted use of a road by the public raises a presumption that a right of way has been conceded by the proprietor of the soil, and if the use has continued for forty years or upwards the presumption can no longer be rebutted.^e Undisturbed possession of land for seven years on a written title, or, in the case of a road, without express title, also raises a presumption of ownership, and affords foundation for a possessory judgment.^f

The exercise of the privileges of a corporation for upwards of forty years raises a presumption that the body exercising them was duly constituted, and supplies the want of a written charter.^g

157. The presumption, *Chirographum apud debitorem repertum*

(a) D. 327-34.

(b) Bell's Pr. 1313-15; *Taylor v. Tullis*, 2 July 1870, 8 M. 936.

(c) *Sup.* §§ 8, 15.

(d) *Decennalis et triennalis possessor non tenetur docere de titulo*; *Cochran v. Smith*, 16 Dec. 1859, 22 D. 259.

(e) *Rodgers v. Harvie*, 1828, 3 W. & S. 251; *Mags. of Elgin v. Robertson*, 17 Jan. 1862, 24 D. 301.

(f) 1 Mackay, 200; *Calder v. Adam*, 2 March 1870, 8 M. 645.

(g) *Skirving v. Smellie*, 1803, M. 10,921.

III.

CH. xvii.
§ 157.Possession of
document of
debt by
debtor.

præsumitur solutum, also arises from possession. It applies chiefly to the case of bills and personal bonds, which are frequently discharged by mere redelivery.^a As already stated, it can, as a rule, be rebutted by the writ or oath of the debtor only.^b It does not apply to heritable rights, which 'cannot be taken away by presumptions and conjectures,' or to bilateral deeds,^c or to a case in which the creditor continues to hold a bond of corroboration or other security.

Possession of
apochæ trium annorum.

The presumption from the *Apochæ trium annorum* that previous debts have been paid may also be said to arise from possession,^d or it may be regarded as a phase of the presumption *omnia rite* arising from a systematic course of business.^e It applies to the case of a debtor holding three consecutive receipts for payments periodically due by him under the same obligation or the same course of dealing. The receipts may be for three yearly or three half-yearly payments;^f but if they be for quarterly or monthly payments, or for payments at irregular intervals, the presumption would be more easily overcome.

Payment pre-
sumed from
non-existence
of bond.

To these presumptions may be added, *Chirographum non exstans præsumitur solutum*.^g If the loss or destruction has been accidental or fraudulent, the creditor may prove the tenor of the document and thus revive it, or he may of course establish his case by the debtor's admission.^h

Presump-
tions against
tutors.

158. Among presumptions from possession may lastly be mentioned, *Tutor præsumitur intus habere ante redditas rationes*.ⁱ Tutors are presumed, before they have stated their accounts, to hold sufficient funds of their pupils to meet any claims they may have against them, so that neither a tutor nor any one in his right can obtain decree for any debt alleged to be due by the pupil until he has actually accounted. Another presumption is, that purchases by a tutor of rights affecting the pupil's estate have been made with the pupil's money. These presumptions

(a) D. 380-1.

(b) *Sup.* § 145.(c) *Sup.* § 113.

(d) D. 384-91.

(e) *Sup.* § 34.(f) *Ersk.* 3. 4. 10; *Bell's Pr.* 567.

(g) D. 382-3.

(h) *Ryrie v. Ryrie*, 26 June 1840, 2 D. 1210.

(i) D. 397-400.

may be redargued by parole evidence, taken in connection with the tutor's accounts.^a

159. The presumption against donation, which is the counterpart of that in favour of loan,^b may be rebutted by parole evidence of the attendant circumstances;^c but if there exist a writ which negatives the averment of donation, the proof would probably be limited to the writ or oath of the donor or his representatives.^d In the case of *mortis causâ* donations the presumption, which is usually weaker, may also be rebutted by parole evidence of circumstances.^e The presumption, however, does not hold where the conveyance is granted in favour of a child or near relation,^f or by one spouse in favour of another;^g but it is applicable to entertainment given or services rendered by friends or relations to persons of independent means.^h

Presumption in favour of loan, and against donation.

Exceptions.

Similarly in the case of services rendered, the presumption is against their being gratuitous, especially if the parties be not related to each other;ⁱ and the occupant of a house belonging to another is presumed to occupy as tenant.^j

The presumption, *Debitor non præsumitur donare*, is similar to that last mentioned, but is still stronger.^k It applies chiefly

Presumption against donation by debtor.

(a) Fraser, P. & C., 2d ed., 320.

(b) L. Wood in *Thomson v. Geekie*, 6 March 1861, 23 D. 693; L. Pr. Inglis in *Ross v. Mellis*, 7 Dec. 1871, 10 M. 197; *Sharp v. Paton*, 21 June 1883, 10 R. 1000.

(c) D. 367-79.

(d) L. J. Clk. Hope and L. Cowan in *Robertson v. Robertson*, 9 Jan. 1858, 20 D. 371. On the other hand, parole is always admissible if fraud, or essential error, or misunderstanding be averred. Cf. *sup.* §§ 95, 137, 143.

(e) *Morris v. Riddick*, 16 July 1867, 5 M. 1036; *Ross v. Mellis*, *sup.*

(f) *Campbell v. M'Alister*, 18 Jan. 1827, 5 S. 219 (204); *Whyte v. Whyte*, 28 Jan. 1841, 3 D. 468.

(g) *Jardine v. Currie*, 17 June 1830, 8 S. 937; *Craig v. Galloway*, 22 June 1860, 22 D. 1211; rev. 1861, 4 Macq. 267; see also *Wright's Exrs. v. City of Glasgow Bank*, 24 Jan. 1880, 7 R. 527.

(h) Ersk. 3. 3. 92.

(i) Fraser, Master & Servant, 3d. ed., 39-48.

(j) *Glen v. Roy*, 28 Nov. 1882, 10 R. 239.

(k) D. 373-9.

III.

CH. xvii.
§ 159.

Questions be-
tween parent
and child.

Payments to
account of
legitim.

Provision
presumed in
implement of
obligation.

No presump-
tion as to
cumulative
provisions.

Presumption
of payment.

Physicians'
fees.

to the case of a debtor making an indefinite payment to his creditor, which it will be presumed to be an instalment of his debt; but the presumption cannot be founded upon for the purpose of contradicting a formal written conveyance.^a

A difficulty sometimes arises when a father who holds funds belonging to his children makes payments on their behalf, as this presumption then conflicts with the opposite presumption that he makes such payments *ex pietate*. The general rule, however, is that, when the father is bound by a formal deed to make provision for his children, the fact of his affording them aliment will not be presumed to be in satisfaction of his obligation, as a probative writ cannot usually be discharged by mere presumptions.^b On the other hand, where gifts of money are made by a parent to a child, they are presumed, in a question with his other children, to be made in part-payment of legitim.^c And when a husband is bound to provide for his wife, or a father for his children, suitable provisions made for the wife or the children respectively are generally held to be in implement of the obligation;^d but whether a legacy is to be held as extinguishing a bond of provision, or to be an additional provision, is a question of circumstances in each case.^e

160. Lastly, when a debt has been discharged, it is presumed to have been paid with the debtor's funds;^f and there exists also a presumption that physicians' fees have been paid at the time when they rendered their services; but these presumptions also yield to contrary evidence.^g

(a) *Ritchie v. Ritchie*, 8 June 1858, 20 D. 1093.

(b) *Scott v. Scott*, 2 June 1846, 8 D. 791; *Galt v. Boyd*, 19 Jan. 1830, 8 S. 332.

(c) *Douglas v. Douglas*, 8 Nov. 1876, 4 R. 105; *Trevelyan v. Trevelyan*, 11 March 1873, 11 M. 516.

(d) D. 377; Ersk. 3. 3. 93; *Thomson v. Thomson's Trs.*, 10 July 1868, 5 Sc. L. R. 742.

(e) *Cowan v. Dick's Trs.*, 1 Nov. 1873, 1 R. 119; L. J. Clk. Moncreiff in *Kippen v. Kippen's Trs.*, 10 July 1874, 1 R. 1171; see also *Kippen v. Darley*, 1858, 3 Macq. 203.

(f) D. 395-6; *Fairbairn v. Fairbairn*, 18 March 1868, 6 M. 640
Welsh v. Welsh's Trs., 19 Jan. 1878, 5 R. 542. (g) D. 392-4.

Counsel's fees are in a somewhat different position. The presumption, or rather legal fiction, is that an advocate acts gratuitously, and he cannot in general recover fees by action against his client. But where he has acted gratuitously, his fees, in the event of success, are recoverable from the losing party.^a

III.

CH. xvii.
§ 160.

Counsel's
fees.

(a) L. Pr. Inglis in *Batchelor v. Pattison*, 30 June 1876, 3 R. 914; 1 Mackay, 115. He may probably also recover fees from an agent who has improperly withheld payment of them: *Buchanan v. Cullen*, 21 June 1862, 24 D. 1132.

CHAPTER XVIII.

COMPETENCY OF WITNESSES.

GENERALLY.

III.

CH. xviii.
§ 161.
—

161. AS a general rule, all persons capable of giving rational evidence are competent witnesses both in civil and criminal cases.^a

Old disabilities removed.

162. The numerous disabilities under which witnesses formerly laboured, such as relationship, interest, and bad character, have been almost entirely removed by statute, and the general rule now is that witnesses are incapacitated by mental infirmity or extreme youth alone. Dumbness does not incapacitate, provided the witness can be made to understand and can answer by means of signs.^b The mental or physical inca-

Dumbness no objection.

Incapacity how proved.

capacity of a witness, like any other fact, must be proved by medical or other witnesses. A lunatic may be examined during a lucid interval as to events which happened before he became insane.^c When a witness is under the age of puberty, it is the duty of the judge to ascertain for himself whether the witness is sufficiently intelligent and trustworthy to be admitted;^d and, if admitted, he will be admonished to tell the truth, but not sworn. The judge should also ascertain for himself the state of the

(a) D. 1670-85; Bell's Pr. 2237-57; Steph. Art. 106-7.

(b) *Howison*, 1871, 2 Coup. 153; *Montgomery*, 1855, 2 Irv. 222.

(c) *Tosh v. Ogilvy*, 9 Dec. 1873, 1 R. 254.

(d) D. 1676-79; *Miller*, 1870, 1 Coup. 430; *Macbeth*, 1867, 5 Irv. 353.

mind of a witness who is alleged to be incapacitated by mental weakness, unless the incapacity be conclusively proved.^a

CH. XVIII.
§ 162.

COMPETENCY IN CRIMINAL CASES.

163. In criminal cases the accused person is inadmissible as a witness; and so also are his or her wife or husband, except when she or he is the party injured by the crime.^b

164. To this rule there are several exceptions. In a prosecution for non-repair of, or nuisance to, highways or bridges,^c and in a prosecution under the Criminal Law Amendment Act,^d both the defendant and the wife or husband of the defendant are admissible as witnesses. A shipowner who sends an unseaworthy vessel to sea is guilty of a misdemeanour, but is admissible as a witness in the case,^e and a parent prosecuted under the Education Act for failure to educate his child may probably also be called as a witness in exculpation.^f

If it be alleged in the course of a trial that a witness is the wife or husband of the accused, though by an irregular marriage, it would probably be held incompetent to prove the marriage incidentally; but the examination of the witness *in initialibus* or other available evidence may suffice to induce the Court to repel or sustain the objection.^g

165. An accused party may be called as a witness on behalf of a fellow-prisoner, but not unless their trials have been separated; and this will only be done on sufficient cause shown.^h

(a) D. 1685; *Riley v. M'Laren*, 23 Dec. 1853, 16 D. 323; see also *inf.* §§ 167, 184.

(b) D. 1717-21, 1671-9; Macd., 2d ed., 471-81; 16 Vict. c. 20, § 3; Steph. Art. 107-8.

(c) Act 40 Vict. c. 14.

(d) Act 48 & 49 Vict. c. 69, § 20.

(e) Act 34 & 35 Vict. c. 110, § 10.

(f) Act 35 & 36 Vict. c. 62, § 70; *France v. Anderson*, 1877, 4 R., Just. C., 42, 3 Coup. 460.

(g) D. 1725-7; *Reid*, 1873, 2 Coup. 415.

(h) D. 1699-1701; *Dempster*, 1862, 4 Irv. 143; *Gollan*, 1875, 3 Coup. 82.

III.

CH. xviii.
§ 165.

Socius criminis may become Queen's evidence.

Prosecutor inadmissible, unless eye-witness.

If a prisoner has pleaded guilty, and the plea has been accepted, he may also be a witness for his fellow-prisoner.^a A *particeps criminis* may be called by the prosecutor as a witness, in which case he is entitled to pardon ; but he probably cannot claim this privilege unless the prosecutor knew him to be an accomplice before his examination.^b The prosecutor is not admissible, unless he has been an eye-witness of the crime libelled.^c

COMPETENCY IN CIVIL CASES.

166. In civil cases the parties themselves and their wives or husbands are admissible as witnesses.^d

Protection of party in consistorial cases.

Children now admissible in civil cases.

167. In consistorial cases, however, although the parties are admissible as witnesses, they are neither liable to be asked nor bound to answer questions tending to show that they have committed adultery, unless they have been already examined for the purpose of disproving the alleged adultery.^e Children under puberty were formerly inadmissible in civil cases, except those in which a delict or injury was in issue ; but this rule has been gradually relaxed, and the evidence of young children is in practice now generally held admissible, *quantum valeat*, but subject to the discretion of the judge as above stated.^f

OBJECTIONS TO WITNESSES.

168. Witnesses who have been bribed or tutored,

(a) Macd., 2d ed., 476 ; *Turner*, 1881, 18 S. L. R. 491.

(b) D. 1694-8 ; L. Mackenzie in *Burke & Macdowall*, 1829, Syme, 373 ; Macd. 463.

(c) *Ferguson v. Webster*, 1869, 1 Coup. 370.

(d) D. 1702-29 ; Bell's Pr. 2240 ; 16 Vict. c. 20, § 3 ; 37 & 38 Vict. c. 64, § 2.

(e) Act 37 & 38 Vict. *sup.* ; *Cook v. Cook*, 4 Nov. 1876, 4 R. 78 ; L. Pr. Inglis in *Kirkwood v. Kirkwood*, 9 Dec. 1875, 3 R. 235.

(f) *Sup.* § 162 ; D. 1674. In England the less satisfactory rule seems to be that children under puberty are admissible, but only on condition that they understand the nature of an oath, and (subject to the possibility of exemption under 32 & 33 Vict. c. 68, § 4) are duly sworn (Best, 7th ed., pp. 155, 158).

or who have been present in court during the examination of other witnesses, may be excluded as disqualified.^a

169. Of the numerous exclusionary rules formerly observed this is now almost the only remnant. It is unlikely, however, that a witness will often be excluded on the grounds of bribery and tutoring, unless of a very flagrant description, especially as the exclusion may deprive the innocent party of valuable evidence obtainable in cross-examination.^b An unusually liberal allowance for expenses, or a service rendered or promised, may be held to amount to bribery.^c Tutoring signifies the instruction of a witness, at the instance of the party adducing him, to make statements which are not based on his own observation; but the improper interference of third parties is not tutoring, though it may affect the credibility of the witness.^d An attempt to bribe or to tutor a witness is an unsatisfactory ground of exclusion, as the witness who has resisted the attempt is not likely to be untruthful or to be biassed in favour of the adducer.

Bribery and tutoring.

Tutoring defined.

A ground of exclusion similar to tutoring is the precognition of witnesses in each other's presence;^e but this objection will not be sustained unless it appear that the precognition has been so taken with the express view of tutoring. Experts may be shown the precognitions of other witnesses on matters of fact without being regarded as tutored, but not the opinions of other experts.^f

Precognition of one witness in presence of others.

The presence of a witness in court during the examination of other witnesses is a ground of exclusion, if the Court be of opinion that the witness has been unduly instructed or influenced

Witnesses generally excluded from court.

(a) D. 1735-60; Macd. 2d ed. 476, 478; 3 & 4 Vict. c. 59, § 3.

(b) Ersk. 4. 2. 28; 2 Hume, 377-8; Bell's Notes, 265-6.

(c) *Humphreys*, 1839, Swinton's Rep. 143-7.

(d) *Hunter*, 1838, 2 Sw. 1; *Clark & Greig*, 1842, 1 Br. 250.

(e) *Reid v. Duff*, 18 Feb. 1843, 5 D. 656; *Duncan v. Thomson*, 16 July 1834, 12 S. 935.

(f) *Mitchell*, 1850, J. Sh. 293; *Fraser v. L. Lovat*, 1 July 1841, 3 D. 1132.

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thereby.^a To this rule, however, there is an exception in favour of the parties themselves and their agents.^b It is also sometimes desirable that scientific witnesses should be present to hear the evidence on matters of fact, but the permission of the Court must be obtained.^c

Other objections.

Enmity.

Atheism.

170. Among grounds of exclusion now practically obsolete may be mentioned the alleged enmity of the witness to one of the parties, and his disbelief in God or in a future state. Enmity, as a ground of exclusion, was required to proceed from a sufficient cause, and to be of an inveterate or deadly character;^d but it is thought that it would now be regarded as merely affecting the credibility of the witness. Atheism, as a ground of exclusion, is virtually abolished by a statute^e which enables any one who, 'according to his religious belief,' holds the taking of an oath to be unlawful, and refuses or is unwilling to be sworn, to make a solemn affirmation or declaration instead. A doubt might arise if the witness ultroneously professed atheism; but it is thought that his evidence must be admitted if he be willing to take the declaration. The difficulty would be more serious if the witness objected to take the declaration on the ground that he had no 'religious belief.' The statutory form ought therefore to be amended by the deletion of these words, as they might possibly lead to the exclusion of important evidence, and thus cause serious injustice.^f

Superior judges probably inadmissible as to procedure.

Lastly, judges of the Supreme Court are probably inadmissible as witnesses with regard to judicial proceedings which have taken place before them.^g In most cases the records of Court and the judge's or shorthand writer's notes of the evidence form the only proper evidence of the proceedings. Inferior judges,

(a) Act 3 & 4 Vict. c. 59, § 3.

(b) Common practice; 16 Vict. c. 20, § 2; *D. 1760*; *Selfe v. Isaacson*, 1858, 1 F. & F. 194; *Mackenzie v. Roy*, 22 March 1830, 5 Mur. 257.

(c) *L. J. Clk. Inglis in Murray*, 1858, 3 Irv. 262; *Milne*, 1863, 4 Irv. 301.

(d) *D. 1761-74*.

(e) Act 28 & 29 Vict. c. 9.

(f) See *Clarke v. Bradlaugh*, 1881, 44 L. T. R. 667.

(g) *D. 1833-8*; *Muckarsie v. Wilson*, 1824, Tait, 393.

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however, have been held competent witnesses with regard to proceedings which have taken place in their presence.^a If the records of Court are insufficient for the purpose required, the clerk of Court or other officer in attendance would seem to be the proper person to call as a witness, or to supply the desired information on a remit from the Court.^b

Inferior judges admissible; also clerk of court.

An advocate can probably not be compelled to give evidence as to what he said in court in his character of counsel.^c

171. Objections to a witness must generally be stated before he is sworn, unless they are to be proved by his own initial examination; but if it be discovered that the witness is the husband or the wife of the accused in a criminal case, and thus disqualified, it is *pars judicis* to stop the examination.^d Objections to evidence taken on commission need not be stated until the depositions are tendered at the trial or proof.^e 'Protesting for reprobators,' or for proof with a view to establish the objection at a later stage (which, however, cannot be done in the case of a jury-trial), is with most of the objections themselves now practically obsolete.^f

Objections must be stated before witness sworn.

'Reprobators' nearly obsolete.

CONFIDENTIALITY—HUSBAND AND WIFE.

172. Confidential communications between husband and wife are protected against disclosure, so long at least as the marriage subsists.^g

173. Neither husband nor wife is competent or compellable to disclose any communication made by one of them to the other during the subsistence of the marriage.^h It has been doubted whether such communications continue protected after the dissolution of the marriage, as the statute is mainly de-

Confidentiality between husband and wife.

(a) *Monaghan*, 1844, 2-Br. 131.

(b) See *M'Donagh v. Ross*, 1869, 1 Coup. 299; *Fogo v. Colquhoun*, 6 Dec. 1867, 6 M. 105.

(c) Steph. Art. III.

(d) D. 1814-27.

(e) D. 1815; A. S. 16 Feb. 1841.

(f) D. 1828-32, 1817; *Anderson v. Gill*, 25 June 1858, 20 D. 1326.

(g) D. 1858-9; 16 Vict. c. 20, § 3; Steph. Art. 110.

(h) Act 16 Vict. c. 20, § 3.

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privilege per-
petual?When inap-
plicable.

signed to prevent them from being used in evidence against either of the parties ; but as they might obviously be used, both in civil and criminal cases, to the prejudice of the representatives of the deceased, it is thought that the privilege should be perpetual. This privilege does not apply to cases in which the conduct of the spouses towards each other itself forms the subject of inquiry, as in actions of divorce or of separation and alimony. Nor may a wife withhold information obtained from her husband when she is examined as to his affairs under the Bankruptcy Act, although her answer may tend to criminate him.^a

CONFIDENTIALITY—AGENT AND CLIENT.

174. Confidential communications between agent and client, so far at least as they have reference to legal proceedings, are protected against disclosure ; and the privilege is perpetual, but may be waived by the client.^b

Confidenti-
ality between
agent and
client.

175. Communications between a party and his legal adviser with reference to legal proceedings pending, or anticipated, or afterwards emerging, and between parties on the same side of a cause and their respective legal advisers, are privileged against disclosure,^c on the ground that secrecy and freedom of communication are indispensable to enable the parties safely to come into court to obtain redress or to defend themselves.^d

Privilege is
perpetual ;

The privilege is perpetual, the communications to which it applies being protected both during the subsistence and after

(a) Act 19 & 20 Vict. c. 79, § 90 ; *Sawers v. Balgarnie*, 17 Dec. 1858, 21 D. 153. The bankrupt himself may also probably be compelled, at his public examination, to answer all questions relating to his estate, although his answers may tend to criminate him (*Goudy on Bankruptcy*, p. 238 ; *inf.* § 181).

(b) D. 1855-7, 1861-80 ; Steph. Art. 115-9.

(c) Ersk. 4 2. 25 ; Bell's Pr. 2254.

(d) L. Chan. Brougham in *Greenough v. Gaskell*, 1833, 1 M. & K. 103, and in *Bolton v. Corp. of Liverpool*, 1833, 1 M. & K. 94-5.

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the termination of the employment;^a and it is immaterial whether the action to which they relate has been actually raised or is only contemplated.^b The privilege applies also to investigations made under the direction of a party's legal adviser,^c and it has been extended to the case of mandataries and of non-professional agents employed by the accused in a criminal prosecution.^d

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applies to contemplated action;

extends to mandataries.

The privilege probably also extends to communications which have had no reference to legal proceedings,^e but the point has not been expressly decided. As communications relating directly or indirectly to a specific action are protected, there is no good reason for withholding protection from those which relate to the general vindication of a party's rights against all possible assailants.

Communication unconnected with action probably privileged.

176. The privilege applies only to communications of a deliberative or consultative character, with reference to the vindication of the client's rights. A law-agent may therefore be examined as to the terms of a transaction or compromise.^f The privilege may be waived by the client, either expressly, or by implication, as by adducing his agent as a witness.^g

Communication must be consultative.

Client may waive privilege.

The privilege does not protect communications regarding fraudulent transactions carried out with the aid of a legal adviser, whether he was aware of their character or not;^h nor does it protect from disclosure any fraud or crime committed after the beginning of the employment and detected by or divulged to the agent.ⁱ

No privilege where agent furthers or is party to fraud.

(a) *Ly. Bath's Exrs. v. Johnston*, 12 Nov. 1811, F. C.; *Wight v. Ewing*, 1828, 4 Mur. 587.

(b) *Gavin v. Montgomerie*, 17 Dec. 1830, 9 S. 213; *Hay v. Edin. & Glasg. Bank*, 26 Feb. 1858, 20 D. 701.

(c) *Wark v. Bargaddie Coal Co.*, 1859, 3 Macq. 467.

(d) *Campbell v. Campbell*, 21 Jan. 1823, 2 S. 139; *Hope*, 1845, 2 Br. 465.

(e) L. J. Clk. Hope and L. Wood in *M'Cowan v. Wright*, 14 Dec. 1852, 15 D. 229.

(f) *Kid v. Bunyan*, 26 Nov. 1842, 5 D. 193.

(g) Act 15 Vict. c. 27, § 1.

(h) *M'Cowan v. Wright*, 14 Dec. and 10 Mar. 1852-3, 15 D. 229, 494.

(i) *M'Lean*, 1838, 2 Sw. 183; *M'Leod v. M'Leod*, 1744, M. 16,754.

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CONFIDENTIALITY—PUBLIC OFFICIALS.

177. Confidential communications passing between public officials in the discharge of their public duties, or made to public officials in the public interest, are protected against disclosure; but the privilege may generally be waived by the head of the department in question.^a

Head of department may waive privilege.

Court may see cause to admit or exclude.

Communings of jury privileged.

178. It is generally the province of the public department to which the communications have been made to decide whether they can be divulged without prejudice to the public interest;^b but if their disclosure would obviously be unattended with such prejudice, or if they have not been made *bonâ fide*, the Court will not hold them privileged.^c On the other hand, the Court may refuse to admit evidence of privileged proceedings, although no objection to their admissibility has been taken.^d The deliberations of Parliament are similarly protected.^e

The rule that the proceedings of a jury are confidential and privileged is somewhat akin to the above; and jurymen are accordingly inadmissible for the purpose of proving their own communings or the mode in which they have arrived at their verdict.^f They might perhaps competently prove an essential error in the recording of the verdict, provided they lodged affidavits to that effect immediately on the discovery of the

(a) 1845-54; *Earl v. Vass*, 1822, 1 Sh. Ap. 229; *Henderson v. Robertson*, 20 Jan. 1853, 15 D. 292; *Beatson v. Skene*, 1860, 5 H. & N. 838; Steph. Art. 112-4.

(b) *Rajah of Coorg v. E. India Co.*, 1856, 25 L. J., Chan., 345.

(c) *Dickson v. E. Wilton*, 1859, 1 F. & F. 419.

(d) *Little v. Smith*, 17 Feb. 1847, 9 D. 737; *Sturrock v. Greig*, 23 Nov. 1849, 12 D. 166.

(e) D. 1844; Steph. Art. 112.

(f) D. 1839-43; Steph. Art. 114; *L. Cowan and L. Benholme in Dobbie v. Johnston*, 19 June 1861, 23 D. 1139.

error ; but, as a rule, they cannot be permitted to impugn, *ex post facto*, the verdict to which they have assented on oath in open court. If a verdict be challenged on the ground that the jury have misconducted themselves, or been tampered with, the allegation must be proved by evidence other than that of the jury themselves.^a

Jurymen inadmissible to prove own misconduct.

CONFIDENTIALITY—PRIVATE DOCUMENTS—CRIMINATING
QUESTIONS—CLERGYMEN AND MEDICAL MEN.

179. (1.) No witness can be compelled to produce confidential documents or those which are not relevant to the cause.

(2.) No witness can be compelled to criminate himself.

(3.) Confessions to a clergyman, *quâ* spiritual adviser, are probably privileged against disclosure, and confidential communications to a medical adviser would perhaps likewise be protected.

180. When a party to the cause is called upon to produce documents relevant to the issue, he cannot refuse to do so unless they fall under the privilege of confidentiality.^b A third party, however, may decline to produce such documents on the broader ground that their production would be prejudicial to his interests or to those of the clients to whom they belong.^c In every case it is the duty of the commissioner who examines the 'haver' or custodier of the documents to exclude those which are plainly irrelevant and those which are confidential ; and even when the haver is a party to the cause, the commissioner is bound to protect his title-deeds or other private

Private documents protected.

(a) *Stewart v. Fraser*, 1830, 5 Mur. 166.

(b) *Sup.* §§ 174-6 : see also chap. xxii. *inf.*, and D. 1337-43.

(c) D. 1343-5, 1362 ; Steph. Art. 118-9.

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Excerpts
admissible.

Privilege in
case of crimi-
nating ques-
tions.

Confessions
to clergy-
men.

Communica-
tions to medi-
cal men.

documents against disclosure.^a In civil cases, when the original documents cannot be produced without inconvenience, or when they are partly confidential or partly irrelevant, excerpts from them made at the sight of the commissioner are admissible.^b

181. Both at common law and by statute a witness is entitled to decline answering any question if the answer would expose him to a criminal charge, or tend to show that he had committed adultery;^c but a witness may be compelled to answer questions which merely tend to impeach his mercantile credit.^d A witness may, however, be asked, and is bound to answer, whether on a specified occasion he made a different statement from that made by him in the witness-box;^e but if the previous statement was made on oath he will not be compelled to answer.^f

182. Confessions made to clergymen are probably privileged, as their disclosure would be inconsistent with good faith and (in the case of the Roman Catholic clergy in particular) contrary to the duty of a confidential spiritual adviser.^g Whether confidential communications made to medical men are privileged is more doubtful; but, if made in strict professional confidence, it is thought that they should also be protected.^h

(a) *Fisher v. Bontine*, 22 Dec. 1827, 6 S. 330; *Don v. Don*, 25 May 1848, 10 D. 1046; *Huxton v. Ed. & Glas. Rail.*, 4 July 1863, 35 Jur. 596; *Tannett v. Hannay*, 18 July 1873, 11 M. 931.

(b) D. 140; *Graham v. Sprot*, 23 Jan. 1847, 9 D. 545.

(c) D. 2016-20; Bell's Pr. 2249; Steph. Art. 120; L. Pr. Inglis in *Kirkwood v. Kirkwood*, 9 Dec. 1875, 3 R. 235; *Johnston*, 1845, 2 Br. 401; *Burke*, 1828, Syme, 364; 16 Vict. c. 20, § 3; 37 & 38 Vict. c. 64, § 2.

(d) D. 1801; *Pender*, 1836, 1 Sw. 25; 19 & 20 Vict. c. 79, §§ 90-1; *A. B. v. Binny*, 4 June 1858, 20 D. 1058; Steph. Art. 120; *sup.* p. 128, note a.

(e) Act 15 Vict. c. 27, § 3.

(f) *Pender, sup.*

(g) D. 1881-5; *M'Laughlin v. Douglas & Kidston*, 1863, 4 Irv. 273, 278; Steph. Note 44.

(h) L. Fraser in *M'Donald v. M'Donalds*, 7 Jan. 1881, 8 R. 357.

CHAPTER XIX.

EXAMINATION OF WITNESSES.

WITNESSES MUST BE SWORN AND EXAMINED ORALLY.

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183. WITNESSES must generally be examined orally, *in causâ*; and before examination they must take the usual oath, or, if they object to do so, make a solemn affirmation that they will speak the truth.^a

184. Witnesses must give their testimony orally in the cause in which it is required, in order that the truth may be elicited by cross-examination, and that the Court may have an opportunity of observing their demeanour; and they must generally speak to matters of fact, and not of opinion.^b This rule is most strictly observed in criminal cases. Letters, reports,^c and even affidavits are accordingly excluded, unless confirmed by the writer when sworn as a witness.^d Scientific facts must also be proved by witnesses and not by books.^e On the other hand, the secondary evidence afforded by letters and other improbative documents is often admissible when the best procurable.^f

(a) D. 1923-34, 1968-71; 28 & 29 Vict. c. 9; Steph. Art. 123-4. In civil cases the evidence is usually recorded by a shorthand writer (see 37 & 38 Vict. c. 64, § 4; as to the duty of sheriffs, see L. J. Clk. Moncreiff in *Roberts v. Henderson*, 1882, 5 Coup. 123), but in criminal cases the judge himself takes notes of the evidence.

(b) *Sup.* §§ 84-7.

(c) Except those of judicial referees: L. Mackenzie in *Brown v. Love*, 15 Jan. 1842, 4 D. 386.

(d) L. J. Clk. Hope in *Wark v. Bargaddie Coal Co.*, 27 Feb. 1855, 17 D. 526; *Glyn v. Johnston*, 5 Dec. 1834, 13 S. 126.

(e) D. 1178; L. J. Clk. Hope in *Thomson*, 1857, 2 Irv. 747.

(f) *Sup.* §§ 37-9, 56, 59, 75-6, etc.

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Form of oath.

Affirmation.

Children
not sworn ;
over fourteen
presumed
capable.Penalties
for perjury
independent
of form of
oath.

If a witness objects to take the usual oath—‘I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth’—its form may be varied ;^a or if he professes conscientious scruples with regard to any form of oath, he may make an affirmation or declaration in the terms prescribed by statute.^b Children under twelve years of age cannot be sworn ; those between twelve and fourteen are only sworn if they appear to understand the nature of an oath ; those over fourteen are presumed to be capable of taking the oath, unless their capacity be impugned. Children incapable of being sworn are examined after having been enjoined by the judge to speak the truth.^c The penalties to which a witness is liable for giving false evidence are independent of the form of the oath or the affirmation administered to him ;^d and the oath or affirmation is binding when duly administered by a judge, or by a commissioner appointed by the Court, or by an arbiter or referee empowered by the parties to take evidence.

EXAMINATION IN CHIEF—CROSS-EXAMINATION—

RE-EXAMINATION.

185. Witnesses are first examined in chief by the adducer, after which they may be cross-examined by the opposite party, re-examined by the adducer on points elicited by the cross-examination, and lastly interrogated by the Court.^e

(a) Act 1 & 2 Vict. c. 105. The substance ought not to be varied ; and in every case, irrespectively of the form of the oath, the witness is under a legal obligation to tell the ‘whole truth’ : *M^lLaughlin v. Douglas & Kidston*, 1863, 4 Irv. 273 ; see also Affirmations Act, 1865, cited in next note.

(b) See 28 & 29 Vict. c. 9, in ‘Table of Statutes,’ *inf.*, where the form is given ; and *cf.* § 170, *sup.*

(c) D. 1671-9 ; *sup.* §§ 162, 167.

(d) Acts 1 & 2 Vict. c. 105 ; 28 & 29 Vict. c. 9.

(e) D. 1977-86 ; A. S. 16 Feb. 1841, § 48 ; Steph. Art. 127.

186. Every witness was formerly examined *in initialibus*, for the purpose of ascertaining whether he was admissible, but this is now unnecessary,^a though still competent.^b After the examination in chief, the opposite party may not only cross-examine the witness on the same points, but examine him as to any other relevant matters;^c but a pursuer has justly been held debarred from cross-examining a witness of the defender on a branch of the case which he had given up and in which (according to the former practice) 'circumduction' had passed against him.^d After cross-examination, the witness may be re-examined by his adducer. After re-examination he cannot be re-cross-examined, but the Court may allow any competent question to be put to him for the purpose of removing doubt. Lastly, the judge may put any questions to the witness which he thinks necessary, or which have been suggested by the jury. The usual sequence of examination may, however, be altered. The cross-examination, for example, may be deferred to a later stage of the case; or a witness may be examined a second time on a different branch, and for this purpose he may be recalled, unless he has been present in court and heard the other evidence on the subject, or has been tutored in the interim.^e A witness may also, on timeous application, be recalled for the purpose of rectifying a mistake, or with a view to his being asked whether he made a different statement on a previous specified occasion.^f

Examination *in initialibus* now rare.
Cross may embrace new points.

Re-examination.

Examination by Court.

Sequence of examination may be altered.

Witness may be recalled.

Questions suggesting the answer desired are incompetent when objected to by the opposite party, but may be asked in cross-examination.^g Questions which assume the truth of

Leading questions incompetent, except in cross.

(a) Act 3 & 4 Vict. c. 59, § 2.

(b) *Reid*, 1873, 2 Coup. 415.

(c) Act 3 & 4 Vict. c. 59 § 4.

(d) *A. B. v. C. D.*, 14 June 1844, 6 D. 1148. When 'circumduction' has passed against a party—*i.e.* when the period allowed for leading proof has expired—a further period may be allowed on special cause shown (*Kennedy v. Macdonald*, 8 March 1867, 5 M. 557).

(e) Act 15 Vict. c. 27, § 4.

(f) Act 15 Vict. c. 27, §§ 3, 4; *Hoey v. Hoey*, 21 Feb. 1884, 11 R. 578.

(g) D. 1983-6; *Muir*, 1858, 3 Irv. 280; Steph. Art. 128.

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Effect of evidence where several co-litigants.

facts that have neither been admitted nor proved are always objectionable.^a

When there are several different parties on the same side of a case, evidence brought out by cross-examination of one of the witnesses on the other side is evidence in the whole cause; but the evidence in chief adduced by one of the parties cannot bind his co-litigants, unless of consent, as they have no opportunity of cross-examining his witnesses.^b

IMPUGNING CREDIBILITY.

187. The credibility of a witness may be impugned by the party against whom he is adduced on the specific ground that he has committed a crime or offence indicating dishonesty, or that on a previous specified occasion he made a statement inconsistent with his evidence given in the witness-box, but not on the general ground that he is a depraved person.^c

Challenge must be on specific ground;

except in case of rape.

188. The fact that a witness has committed a specific crime indicating dishonesty of character may be proved by his own admission,^d and he cannot decline to answer whether he has been convicted of a crime.^e A previous conviction may also be proved otherwise, but the fact that he has committed a crime for which he has not been tried cannot of course be proved incidentally. In trials for rape, however, the character of the alleged sufferer when examined as a witness may be assailed on general grounds, with a view to diminish her credibility, as the case usually turns almost exclusively on her

(a) See, for example, the improper use of the word 'still' in *M'Laren v. Buik*, 20 June 1829, 7 S. 780.

(b) L. Pr. Inglis and L. Shand in *Ayr Road Trs. v. Adam*, 14 Dec. 1883, 11 R. 337, 338.

(c) D. 1793-1813; 15 Vict. c. 27, §§ 1, 3; *Tennant v. Tennant*, 13 July 1883, 10 R. 1187.

(d) *King v. King*, 2 Feb. 1842, 4 D. 590; *Blair*, 1844, 2 Br. 167.

(e) *Johnston*, 1845, 2 Br. 401.

evidence, and it may be difficult or impossible to prove specific offences against her.^a But unchaste conduct on the part of the witness is deemed irrelevant if it took place at some interval before the date of the offence, or with persons other than the prisoner.^b Notorious immorality will necessarily impair the credibility of a witness, but his evidence will not on that account be excluded.^c

189. If the evidence of a witness is to be impugned by proving that, on a previous specified occasion, he made a different statement, a foundation for the proof must be laid by interrogating him with regard to the statement in question.^d If doubt is thrown on the veracity of a witness by subsequent and unexpected evidence of a matter upon which he has not been cross-examined, the evidence is not incompetent, but he may be recalled to explain it.^e It has been held incompetent to discredit the evidence of a witness by proving that he made a different statement on precognition.^f This is undoubtedly a salutary general rule; but as such proof seems to have been competent before the passing of the act cited,^g and to be expressly sanctioned by it, it would probably be regarded as admissible in very special circumstances, *quantum valeat*.^h

Proving
different
statement on
former occa-
sion ;

different
statement on
precognition.

190. If a witness is cross-examined for the purpose of testing

(a) D. 23, 29, 1800.

(b) *Reid*, 1861, 4 Irv. 124. The latter of the above limitations, however, seems unduly strict, and if observed in practice would generally prevent the accused from leading any evidence at all as to the woman's character. See *Dignan*, 1854, 1 Irv. 357. Specific notice of the defence should be given to the prosecutor: *Reid*, *sup.*; *Forbes*, 1858, 3 Irv. 186.

(c) *Tennant v. Tennant*, *sup.* (value of evidence of prostitutes).

(d) Act 15 Vict. c. 27, § 3; *Gall v. Gall*, 23 Nov. 1870, 9 M. 177; *Robertson v. Stewart*, 27 Feb. 1874, 1 R. 532.

(e) Act 15 Vict. c. 27, § 4; *Robertson v. Mackenzie*, 1856, 2 Irv. 411.

(f) *O'Donnel*, 1855, 2 Irv. 236; L. J. Clk. Inglis and L. Neaves in *Emslie v. Alexander*, 20 Dec. 1862, 1 M. 209.

(g) D. 1808.

(h) Such proof was admitted in *Robertson*, 1873, 2 Coup. 495; but it was observed that the precognition was not on oath, while the evidence was. Cf. § 38, *sup.*

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Cross regard-
ing character
must be
reasonable.
Other modes
of discredit-
ing.

Party may
not discredit
own witness,
unless hostile
or tampered
with.

his credibility or impugning his character, it is within the discretion of the Court to disallow questions referring to a remote period, or containing imputations which would not materially affect the credibility of the witness.^a

Interest, agency, or relationship, malice or enmity, or other ground on which a witness might formerly have been excluded, may be proved by himself or by other evidence for the purpose of impairing his credibility.^b

Although, as a rule, it is the party against whom a witness is adduced who is entitled to impeach his veracity, the adducer may competently discredit a hostile witness whom he has been compelled to call, or one who appears to have been tampered with by his opponent.^c

REFRESHING MEMORY.

191. A witness may refresh his memory during examination by referring to notes made by himself at or shortly after the date of the transaction in question, or to memoranda written by others, provided he has read them, and is satisfied of their accuracy.^d

Witness must
speak from
memory ;
but may use
notes to re-
call details.

192. A witness when under examination must, as a rule, give his evidence orally, and from his own unaided recollection, and he cannot competently read or tender a prepared written statement in reply to the questions he is asked ;^e but he may refresh

(a) Common practice. See also *Innes v. Innes*, 1837, 2 S. & M'L. 417; *Reid*, 1861, 4 Irv. 124. In England, where no such humane safeguard exists, cross-examinations are frequently in the highest degree inquisitorial and oppressive. See Steph. Note 46.

(b) L. J. Clk. Hope in *King v. King*, 27 Nov. 1841, 4 D. 128.

(c) L. Mackenzie in *Keddie v. Christie*, 24 Nov. 1848, 11 D. 145, 150; L. Ch. Com. Adam in *Manuel v. Fraser*, 1818, 1 Mur. 390, and in *Smith v. Puller*, 1820, 2 Mur. 346.

(d) D. 2005-15; Steph. Art. 136-7.

(e) *Hook v. Hook*, 26 Feb. 1852, 14 D. 544.

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his memory as to dates, sums of money, measurements, or other details, by means of notes made by himself or under his authority.^a Such memoranda may be quite informal,^b and they need not be lodged in process;^c but the cross-examining counsel is entitled to see them.^d Copies of such memoranda, however, may not be used if their accuracy seems doubtful.^e

Notes need not be lodged.

A witness being entitled to refresh his memory from informal notes, should *a fortiori* be allowed to use for the same purpose a formal deposition emitted by him on a previous occasion.^f

Previous deposition probably available.

193. Medical or other scientific witnesses are allowed, contrary to the general rule, and particularly in criminal cases, to read and swear to reports they have drawn up, on the ground that the circumstances are often too minute and complex to be remembered accurately; but such reports must be libelled on and lodged with the clerk of Court like other productions.^g

Medical reports in different position.

An expert may refresh his memory by reference to a scientific treatise, passages from which become evidence when adopted by him.^h

Expert may refer to treatise.

NUMBER OF WITNESSES.

194. No issue or libel can be proved by the unsupported testimony of a single witness; but when a number of connected facts are in issue, each of them may generally be proved by one witness.ⁱ

195. If the evidence of a single witness regarding the facts in issue be direct and distinct, and be corroborated by indirect

One witness sufficient if corroborated.

(a) *Wilson*, 1861, 4 Irv. 42; *Gibb*, 1871, 2 Coup. 35.

(b) *Wilson v. Glasgow & S. W. Rail.*, 25 July 1851, 14 D. 1.

(c) *Graham's Trs. v. White*, 1829, 5 Mur. 95.

(d) D. 2015; Steph. Art. 137.

(e) *Campbell v. Macfarlane*, 25 Feb. 1840, 2 D. 663.

(f) *Mags. of Brechin*, 26 Feb. 1835, 13 S. 556, cf. § 193: but see *Cogan v. Lyon*, 18 March 1834, 12 S. 569.

(g) *Macnamara*, 1861, 4 Irv. 131; *Macpherson*, 1845, 2 Br. 450.

(h) D. 1178; Steph. Art. 137; *sup.* § 59.

(i) D. 2038-44; Stair, 4. 43. 1-3; 2 Hume, 382.

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One witness
to each of
similar acts
sufficient.

Indirect evi-
dence of adul-
tery enough.

Two wit-
nesses neces-
sary to prove
treason.

One witness
may prove
illegal fish-
ing, illness of
witness, etc.

evidence, the facts will generally be held to be proved; but if the only direct evidence be that of a *particeps criminis*, it requires stronger corroboration from unsuspected testimony.^a One witness suffices to prove a criminal libel if corroborated by an admission of guilt in the prisoner's declaration. When the facts in issue are substantially connected, or show system or design, one witness suffices to prove each, as when they consist of a series of thefts of the same character, committed in the same locality and about the same time,^b or several repetitions of the same slander,^c or several acts of adultery with the same person,^d and probably also with different persons.^e In actions of divorce, adultery may be inferred from circumstances, without direct proof of any specific act.^f Among such circumstances may be mentioned indecent conduct towards persons other than those with whom the adultery is alleged to have been committed.^g

To the above rule there are several statutory exceptions. In a prosecution for seditious or treasonable words or practices, each act or expression must be proved by two credible witnesses.^h On the other hand, in a prosecution for taking salmon during close-time, the evidence of a single witness uncorroborated is declared sufficient to prove the offence.ⁱ Lastly may be mentioned the well-established practice of holding the illness or death of a witness or a juryman to be sufficiently proved by the evidence of one witness.^j

(a) *Campbell*, 1855, 2 Irv. 232.

(b) Common practice.

(c) *Ramsay v. Nairne*, 20 Aug. 1833, 11 S. 1033, 1046; *Dougall v. Dougall*, 22 July 1833, *ib.* 1020, 1026; L. Cowan in *Wilson v. Weir*, 22 Nov. 1861, 24 D. 67, 75.

(d) *Murray v. Murray*, 14 July 1847, 9 D. 1556.

(e) D. 2039.

(f) L. Pr. Inglis in *Walker v. Walker*, 27 Jan. 1871, 9 M. 460; see also Act 1644, c. 184, in 'Table of Statutes,' Appx., *inf.*

(g) *Whyte v. Whyte*, 15 March 1884, 11 R. 710.

(h) Act 11 Vict. c. 12, § 4.

(i) Act 31 & 32 Vict. c. 123, § 30; *Jopp v. Pirie*, 15 April 1869, 7 M. 755.

(j) *Wilcox v. Farrell*, 26 Feb. 1848, 10 D. 807; A. S. 16 Feb. 1841, § 17.

196. At a time when witnesses were held disqualified on account of relationship, interest, and on many other grounds, it frequently happened that the only existing evidence of the facts in issue was thereby excluded. To obviate the *penuria testium* which thus arose, it was the practice to admit, *cum notâ*, a number of the witnesses who were deemed objectionable,^a or to allow the judicial examination of the parties themselves.^b But as almost the last relic of the old exclusionary rules with regard to civil cases has recently been swept away,^c the question of *penuria testium* can hardly again arise.^d

(a) D. 1791-2.

(b) D. 1394-1404; *Surtees v. Wotherspoon*, 20 Jan. and 26 June 1872, 10 M. 355, 866.

(c) By 16 Vict. c. 20, § 3, in conjunction with 37 & 38 Vict. c. 64, § 1, which repeals § 4 of the former act: so that the parties to an action and their husbands and wives are now admissible in all civil actions, and also (by § 2 of the later of these acts) in the quasi-criminal proceedings relating to adultery.

(d) Cf. §§ 166-7, *sup.*

CHAPTER XX.

OATH ON REFERENCE—OATH OF CALUMNY—
AFFIDAVITS.

PARTY MAY REFER CAUSE TO OATH OF ADVERSARY.

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—

197. ONE of the parties may refer the whole cause, or part of it, to his adversary's oath at any stage of the proceedings, unless he has already examined his adversary as a witness ; and the oath thus emitted is conclusive of the matters referred.

Meaning of
reference to
oath.

Court may
refuse to
allow it.

When
competent.

May be made
at any stage.

198. This exceptional mode of proof, which has been already mentioned,^b is permitted on the ground that, while a party is upon the evidence legally entitled to judgment, he may possibly, when his conscience is appealed to, admit the justice of his adversary's case. The Court may, however, see cause to refuse to allow the reference.^c This mode of proof is competent in civil cases only, and not in such as involve penal consequences, except of consent.^d

The reference may be made at any stage of the proceedings, provided the party to whom it is to be made has not been

(a) D. 1536-1620 ; 10 Vict. c. 20, § 5 ; Bell's Pr. 2263 ; L. Moncreiff in *Pattinson v. Robinson*, 4 Dec. 1846, 9 D. 226.

(b) *Sup.* chap. xv.

(c) L. Chan. Lyndhurst in *Ritchie v. Mackay*, 1829, 3 W. & S. 490 ; *Pattinson, sup.*

(d) *Conacher v. Conacher*, 1 March 1859, 21 D. 597.

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adduced as a witness.^a It may even be made after judgment of the House of Lords,^b if decree has not yet been extracted, and it is also competent after the parties have renounced probation,^c but it is probably incompetent after the parties have expressly agreed to refer the whole cause to an arbiter.^d The reference must be made judicially, and it differs from the evidence of a witness in being conclusive with regard to the matters referred, and incapable of being contradicted by other evidence. The party referring may resile from the reference, but the Court may refuse to allow a retraction if the opposite party would thereby be prejudiced.^e The party referred to may 'defer' any matter with which he is imperfectly acquainted to the oath of his opponent.^f

Must be made judicially.

May be retracted by leave of Court.

199. Reference to the oath of a party's agent or mandatary is competent when he has full authority to bind his principal, and when the principal is entirely ignorant of the matter in issue.^g On the other hand, if reference be made to the party's oath, and he depone that his agent alone is acquainted with the matter, reference to the agent's oath does not become competent, but he may probably be examined as a witness.^h If the whole business of a firm is intrusted to one partner, his oath may be referred to and will bind the firm in matters connected with its business.ⁱ But, while the constitution of a debt may be proved by reference to the oath of one of several partners, each having power to bind the firm, its subsistence can only be proved by a reference to all.^j

Reference to oath of agent ;

to oath of partner ;

So, also, reference may be made to the oath of a party's wife to oath of wife and of tutor ;

(a) Act 16 Vict. c. 20, § 5.

(b) *Longworth v. Yelverton*, 30 July 1867, 5 M., H. L., 144.

(c) *Anstruther v. Wilkie*, 31 Jan. 1856, 18 D. 405.

(d) *M'Larens v. Shore*, 3 July 1883, 10 R. 1067.

(e) *Dick v. Hutton*, 17 Feb. 1876, 3 R. 448.

(f) *Ersk.* 4. 2. 8.

(g) D. 1590-2.

(h) *Cf.* §§ 44-5, *sup.*; *Mackay v. Ure*, 13 Nov. 1847, 10 D. 89 ; 7 March 1849, 11 D. 982.

(i) *Gow v. Macdonald*, 1827, 5 S. 472.

(j) *M'Nab v. Lockhart*, 10 March 1843, 5 D. 1014 ; L. J. Clk. Hope in *Broom v. Edgley*, 31 May 1843, *ib.* 1087, 1094.

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§ 199.to oath of
trustee.Oath of
agent is not
'oath of
party' as re-
quired by
statute.

with regard to matters falling under her *præpositura*, or relating to her separate estate,^a and to the oath of a tutor as to matters falling strictly within his administration,^b but not to the oath of a curator with regard to the affairs of his ward. Reference to the oath of a trustee is also competent with regard to matters falling exclusively under his management.^c

On the other hand, it is important to observe that, when proof is expressly limited by statute to the writ or oath of the party or of the debtor, a reference to the oath of the party's agent or manager will not be sustained.^d

CONSTRUCTION OF OATH—INTRINSIC AND EXTRINSIC
QUALIFICATIONS.

200. When an admission on oath is coupled with an explanation or qualification which neutralises it, effect must be given to the qualification when intrinsic to, or inseparable from, the admission ; but if the qualification be extrinsic to, or separable from, the admission, it will be disregarded, unless proved by the deponent otherwise than by his own statement.^e

Construction
of oath.

201. It must be borne in mind that the construction of an oath varies in accordance with the circumstances in which the reference is made. The whole of the facts in issue, for example, may, after the failure of other proof, be referred to the party's oath ;^f or a party may be required by statute to prove the constitution and subsistence of a debt, or its subsistence

(a) 1 Fraser, H. & W., 2d ed., 628 ; *Gifford v. Rennie*, 1 March 1853, 15 D. 451.

(b) Stair, 1. 6. 20.

(c) *Nisbet's Trs. v. Morrison's Trs.*, 23 Jan. 1829, 7 S. 307 ; see also *Bertram*, *inf.*

(d) *Bertram & Co. v. Stewart's Trs.*, 19 Dec. 1874, 2 R. 255.

(e) D. 1621-56.

(f) *Sup.* §§ 197-8.

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only, by his opponent's oath, or to prove in the same limited manner that an apparently absolute conveyance is really a trust. The general rules for the construction of qualified oaths are, however, substantially the same in all cases.

The oath is generally conclusive with regard to the matters referred, though contradicted by other evidence, or even by the deponent's writ, but its construction often gives rise to difficulty. The statement, *non memini*, is inconclusive; but if the matter be a *factum proprium*, or one which the deponent could not fail to remember, this answer is deemed equivalent to an admission.

Oath on reference generally conclusive.

Non memini.

As a rule, the direct statements of fact made by the deponent are alone held to constitute his deposition, his comments and inferences being disregarded. If, for example, a debtor depone that he gave money to a friend to pay the debt, and that he supposes the debt was paid by him, though he never heard that it was paid or saw a receipt, the oath is held to be affirmative, and to prove resting-owing, the giving of money to a friend being *per se* inconclusive, and the inference being disregarded as irrelevant.^a So, also, if documents or accounts be imported into the deposition, they must be produced, and the deponent's construction of them will be disregarded.^b

Comments and inferences disregarded.

Documents referred to must be produced.

202. The distinction between intrinsic and extrinsic qualifications is sometimes narrow.^c To the former class belong the following cases, in which the admission is neutralised by the qualification: An admission by a deponent, sued for repayment of money, that he received it, but as a gift,^d or to be repaid by board and lodging;^e an admission by a party sued under a verbal contract that it was entered into, but was not to be binding till reduced to writing;^f an admission by a party that he signed a document, but by

Intrinsic qualifications.

(a) *Crichton v. Campbell*, 6 March 1857, 19 D. 661.

(b) *Hunter v. Geddes*, 29 Jan. 1835, 13 S. 369.

(c) See cases of *Thomson and Cowbrough*, *inf.* § 203.

(d) *Stewart v. Walpole*, 1804, Hume, 416.

(e) *Thomson v. Duncan*, 10 July 1855, 17 D. 1081.

(f) *Campbell v. Douglas*, 1676, M. 8470 & 13,203.

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They generally deny constitution.

Intrinsic qualifications in oaths as to bills.

Distinction between intrinsic and extrinsic qualifications.

mistake ;^a an admission by a party sued for wages that the services were rendered, but in return for board and lodging ;^b an admission by a party sued for the price of goods that they were furnished, but on the credit of some one else,^c or that they were not to be paid for in money,^d or that they were rejected as being of bad quality.^e In all these cases the so-called qualification is obviously a denial that the alleged contract was ever entered into or that a debt was constituted. So also, in claims under a prescribed bill, it is generally an intrinsic qualification of the deponent's oath that the bill was granted for an illegal consideration, the qualification being a denial that any debt has been legally constituted.^f

203. Where, on the other hand, the constitution of the obligation is admitted, but discharge by a subsequent transaction is averred, the qualification is intrinsic if the deponent swears that the creditor agreed to the discharge, but extrinsic if the deponent merely believed or understood that the debt was so discharged.^g

(a) *Agnew v. Macrae*, 1782, M. 13,219.

(b) *Alcock v. Easson*, 20 Dec. 1842, 5 D. 356.

(c) *Meyer & Mortimer v. Lennard*, 25 Nov. 1851, 14 D. 99.

(d) *Lauder v. M'Gibbon*, 1727, M. 13,206.

(e) *Trotter v. Clark*, 1667, M. 13,204.

(f) D. 445.

(g) *Hamilton's Exrs. v. Struthers*, 2 Dec. 1858, 21 D. 51 ; *Thomson v. Duncan*, 10 July 1855, 17 D. 1081 ; *Cowbrough & Co. v. Robertson*, 18 June 1879, 6 R. 1301. In Thomson's case (1st branch) the defender deponed that his creditor had agreed, *at the time* when the loan was granted, that it should be repaid in a certain way, and that it had been so repaid. In the 2d branch he deponed, but in somewhat general terms, that his creditor had *subsequently* agreed that a balance of the loan should be repaid in a different way, and that it had been so repaid. The qualification of the admission of the loan was held intrinsic in the former case and extrinsic in the latter. In Cowbrough's case the defender deponed that his creditor had agreed *subsequently* to the granting of the loan that it should be repaid in a certain way, and that it had been so repaid. In this case the qualification was held intrinsic, because explicit and circumstantial. See also *Fenning v. Meldrum*, 17 Nov. 1876, 4 R. 148.

This rule, which applies chiefly to the case of proving the subsistence of a debt which has fallen under the operation of the triennial, the quinquennial, or the sexennial limitation, may be somewhat expanded as follows :—

(1.) A statement by the deponent that there was a stipulation at the contraction of the debt that it should be extinguished otherwise than by a payment in money, and that the stipulation was acted upon, is an intrinsic qualification, negating the subsistence. Canons of construction.

(2.) A statement that by express subsequent agreement the debt was discharged otherwise than by payment is also intrinsic

(3.) A statement that the creditor expressly agreed to forgive the debt is also intrinsic and negative.

(4.) The same is the case when it is stated that the creditor agreed to hold the debt compensated.

(5.) But if the deponent merely states his belief or understanding that the debt was extinguished by compensation or other subsequent transaction, the qualification is extrinsic, and he must bear the *onus* of proving that it was truly so extinguished.^a

Thus, where a servant suing for wages is met by the defence that they have been forfeited in consequence of his misconduct, the qualification of forfeiture is extrinsic to the admission that the debt subsists, and must be proved otherwise than by the deponent's oath.^b Extrinsic qualifications.

204. Again, if the deponent admit that a verbal obligation was entered into and allege a verbal discharge, the qualification is intrinsic to the admission and neutralises it.^c If, however, he admit the validity of a written obligation, but aver the adjection of a verbal condition, or that the obligation was discharged verbally, the qualification is deemed extrinsic and will be disregarded, on the ground that a written obligation cannot usually be modified or discharged verbally.^d Cases of written and verbal contracts differ.

(a) *L. Deas* in *Cowbrough*, *sup.*

(b) *Workman v. Young*, 1699, M. 13,234.

(c) *Newlands v. M'Kinlay*, 16 Dec. 1885, 13 R. 353.

(d) *Ersk.* 4. 2. 13; *Christie v. Christie*, 1745, M. 13,225; *Blair v. Balfour*, 1748, M. 13,217.

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§ 204.Consent the
essential
point.Extrinsic
qualification
must be
proved.

When an averment of discharge is intrinsic to the oath, the mode in which it was effected is immaterial, the essential requirement being an explicit statement by the deponent that the creditor consented to the discharge.^a

When the averment of discharge is extrinsic, being dependent on the construction of a document or on the validity of a plea of compensation, the Court must decide whether the defence is sufficiently proved otherwise than by the deposition;^b and if the amount of the debt be disputed, it may be ascertained by proof *prout de jure*.^c

OATH OF CALUMNY—AFFIDAVITS.

205. A creditor or a pursuer is frequently required to establish a *prima facie* case by making oath that his claim is just; but such oath must generally be corroborated by other evidence.^d

Oath of cal-
umny, or de-
claration that
cause is just;

206. Among such preliminary statements on oath, one of the most familiar is the oath *de calumniâ*, or a declaration that the cause is free from *calumniâ* ('false accusation' or 'trickery').^e Originally the pursuer was required to take this oath in every

(a) Cases of *Cowbrough*, *Thomson*, and *Newlands*, *sup.*

(b) D. 456-8.

(c) *Hepburn v. Hepburn*, 1806, Hume, 417; *Thomson, sup.*; *Fife v. Innes*, 17 Nov. 1860, 23 D. 30. In each case it is important to attend to the precise circumstances in which the reference is made, and to the precise terms of the oath emitted; and in each case the question is one of fact rather than of law, so that no very satisfactory general rule on the subject can be laid down. It has been said, for example, that whatever is *pars ejusdem negotii* is intrinsic, while *aliud negotium* is extrinsic. The former proposition is generally true, unless one part of the *negotium* be in writing and another verbal (note *d*, p. 147, *sup.*); but the latter is only true when the creditor is not said to have agreed to it. (See *L. Wood in Thomson*, and *L. Deas in Cowbrough, sup.*, and in *Cooper v. Marshall*, 1877, 5 R. 258.)

(d) D. 1526-37, 1662-9.

(e) See Ulpian in Dig. 39, 2; 7, pr., and 13, § 13.

case, but it is now in disuse except in consistorial causes.^a It is usually administered by the Lord Ordinary after the action has been found relevant and immediately before the beginning of the proof; but it may, on cause shown, be taken on commission.^b

now used in consistorial cases only.

207. An affidavit, or *ex parte* statement on oath before a magistrate or justice of peace or the judge ordinary, committed to writing, is usually admissible without extrinsic proof of its genuineness, for the limited purpose of enabling a party to establish a *prima facie* foundation for a claim which he must afterwards substantiate by other evidence. As in the case of other formal and official documents, its admissibility in evidence depends on its regularity in form.^c Among the statutes which require claims to be supported by affidavits may be mentioned the Entail Amendment Act, 1848, the Bankruptcy Act, 1856, and the Confirmation of Executors Act, 1858.^d The Act of Sederunt, 10 Feb. 1841, § 17,^e also requires the production of an affidavit to satisfy the Court that a witness is likely to be unable to attend a jury-trial. At common law an affidavit is required in an application for a warrant of apprehension of a debtor *in meditatione fugæ*.^f The abuse of affidavits is checked by the Act 5 & 6 Will. IV. c. 62.

Affidavit sometimes required as *prima facie* evidence;

must be regular in form;

required in some cases by statute;

by Act of Sederunt;

at common law.

As the person against whom an affidavit is used has no opportunity of cross-examining the deponent, such documents are not admissible on the merits of the case, or after the death of the deponent, or when he is abroad and refuses to give evidence before a commission of the Court.^g In cases of pedigree, however, affidavits by deceased persons will be admitted for what they are worth, provided they appear to be free from bias or bad faith.^h

Affidavits in admissible on merits.

(a) Act 11 Geo. IV. & 1 Will. IV. c. 69, § 36.

(b) *Murray v. Murray*, 20 Feb. 1846, 8 D. 535.

(c) *Jardine v. Harvie*, 18 July 1848, 10 D. 1501.

(d) Acts 11 & 12 Vict. c. 36, § 6 (and 16 & 17 Vict. c. 94, § 17); 19 & 20 Vict. c. 79, §§ 22, 58, 147; 21 & 22 Vict. c. 56, § 17.

(e) Cf. §§ 208-11, *inf.*

(f) 2 Bell's Com. 559.

(g) *Mags. of Aberdeen v. More*, 1813, Hume, 502; *Glyn v. Johnston*, 5 Dec. 1834, 13 S. 126.

(h) *Lauderdale Peerage*, 1885, 10 L. R., H. L., 692.

CHAPTER XXI.

*EVIDENCE ON COMMISSION IN CIVIL CASES—
DEPOSITIONS IN CRIMINAL CASES.*

COMMISSION BEFORE ISSUES ORDERED.

III.

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208. WHEN one of the parties to a cause in which issues have not been ordered states that it is probable that one or more of his witnesses will be prevented from attending the trial by illness, old age, or necessary absence from the country, he may apply to the Court for a commission to examine them; and their depositions will then lie *in retentis* till the trial.^a

Witness examined on commission, when ill, aged, or necessarily absent.

209. This rule, which belongs rather to the law of procedure than to that of evidence, forms an exception to the rule that witnesses are required to depone orally *in causa*.^b The witness must be incapacitated from travelling by illness,^c or by old age;^d or his absence must be unavoidable.^e But a statement that the

(a) D. 1939-53; 2 Mackay, 76 *et seq.*; A. S. 11 Mar. 1800; A. S. 11 July 1828, § 117.

(b) *Sup.* § 184.

(c) *Gordon v. Orrok*, 14 July 1849, 11 D. 1358; *Wilcox v. Farrell*, 26 Feb. 1848, 10 D. 807.

(d) Seventy years or upwards: *Watsons*, 16 Dec. 1829, 8 S. 261; A. S. 1828, *sup.*

(e) *Clouston v. Morris*, 15 Feb. 1848, 20 Jur. 228; *Ferrier v. Berry* 11 July 1822, 1 S. 560 (598).

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witness intended to emigrate has been held sufficient.^a Proof of the witness's age is led before the commissioner,^b but sufficient proof of illness must be adduced to the Court before the commission is granted, one witness generally sufficing.^c Objections to the depositions so taken are usually pleaded at the trial,^d but preliminary objections may be disposed of by the Court, and questions of confidentiality by the commissioner.

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One witness may prove illness.

Objections when stated.

One of the parties to a cause may obtain a commission to examine an opponent who is incapacitated from appearing in Court;^e but it is not settled whether the evidence of a party taken on commission is admissible as evidence in his own favour.^f If his opponent has been present at the diet and has had an opportunity of cross-examining him, such evidence would seem clearly admissible in his favour; but if his opponent has had no such opportunity, it is thought that the evidence, though perhaps not absolutely inadmissible, would be entitled to little more weight in the party's favour than an extrajudicial statement or his averments on record.^g

The depositions can only be used if the witness be actually prevented from attending the trial, in which case it was formerly the rule that he should be again examined before the trial on adjusted interrogatories;^h but these are now invariably dispensed with of consent, and they cannot be required when the witness is a foreigner, and probably beyond the jurisdiction of the Court.ⁱ Interrogatories, however, are necessary when the commission is to be executed in a foreign country, unless dispensed with by the parties.^j

Interrogatories usually dispensed with,

except when witness abroad.

(a) *Munro v. Mackenzie*, 23 June 1831, F. C.

(b) *Watsons, sup.*; *Morrison v. Cowan*, 1828, 6 S. 1082.

(c) *Willox, sup.*

(d) *Copland v. Bethune*, 1827, 5 S. 272; A. S. 16 Feb. 1841, § 17.

(e) *Laing v. Nixon*, 25 Jan. 1866, 4 M. 327.

(f) *Sheard v. Haldane*, 20 March 1867, 5 M. 636.

(g) *Inf.* § 213; cf. the English rule there noted. *Sup.* § 41.

(h) A. S. 16 Feb. 1841, § 17.

(i) *Boettcher v. Carron Co.*, 17 Jan. 1861, 23 D. 322.

(j) L. J. Clk. Patton in *M'Lean & Hope v. Fleming*, 9 March 1867, 5 M. 579.

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Commission
may be
granted by
Sheriff.

Authority to grant commissions for the examination of witnesses unable to attend a trial was conferred upon the Sheriff Court by an Act of Sederunt^a subsequent to those mentioned above (§ 208, note a).

AFTER ISSUES ORDERED.

210. In cases in which issues have been adjusted, or a proof before a judge allowed, the party applying for a commission must prove to the satisfaction of the Court that the witnesses are likely to be unable to attend the trial, owing to illness, infirmity, old age, or intended absence, and must adjust interrogatories on which the examination is to take place; but in proofs before a judge these may be dispensed with of consent.^b

Disability of
witness must
be proved.

Interrogato-
ries dis-
pensed with
in proofs.

Proof neces-
sary that wit-
ness cannot
attend.

If witness
dies before
second trial
deposition
may be used.

211. The chief differences between this rule and the preceding are that in this case the witnesses must be named in the application,^c that 'it shall be made out on oath to the satisfaction of the Court' that the witness is likely to be unable to attend the trial, and that interrogatories are imperative.^d In proofs before a judge, however, and in cases of urgency, interrogatories are usually dispensed with.^e The depositions thus taken, whether on interrogatories or not, can only be used at the trial if it be 'established at the trial to the satisfaction of the Court by affidavit or by oath' that the witness is still unable to attend, such proof being however dispensed with in the case where the witness is a foreigner.^f If a witness has been examined on interrogatories, and afterwards at the trial, but dies before a second trial, either his deposition on commission or

(a) A. S. 10 July 1839, § 73.

(b) D. 1954-64; A. S. 16 Feb. 1841, § 7; 2 Mackay, 76 *et seq.*

(c) *Gray v. Sutherland*, 10 March 1849, 11 D. 1023.

(d) *M'Lean & Hope v. Fleming*, 9 March 1867, 5 M. 579.

(e) *A. v. B.* 1831, 4 D. & And. 252.

(f) *Boettcher v. Carron Co.*, 17 Jan. 1861, 23 D. 322.

the judge's notes of his evidence at the first trial may be used at the second. A witness may also, on cause shown, be re-examined on commission with a view to a second trial.^a A witness who has been examined on commission is entitled to have his deposition cancelled before being examined at the trial.^b

Sheriffs are empowered by statute to grant commissions to examine witnesses after the diet of proof has been fixed.^c

DEPOSITIONS IN CRIMINAL CASES.

212. In criminal cases either the prosecutor or the prisoner may cause a witness whose death is apprehended to be examined before a magistrate, and may require the deposition thus obtained to be read at the trial.^d

213. Application for authority to examine a witness who is dangerously ill, proceeding on a medical certificate, is made to the judge ordinary or to a magistrate. It is unnecessary that the witness should be, or believe himself to be, dying.^e The deposition is taken by the magistrate, or in his presence by the procurator-fiscal, and is signed by the magistrate, who with another witness must prove the deposition at the trial. Such depositions are unsatisfactory, being *ex parte*.^f

These depositions must not be confounded with 'dying declarations,' or informal statements made by dying persons. Secondary evidence of such declarations, if they are relevant, is admissible under the rule which permits proof of statements by deceased persons who would have been competent witnesses.^g It is not

(a) *Willox v. Farrell*, 26 Feb. 1848, 10 D. 807.

(b) *Kitchen v. Fisher*, 1821, 2 Mur. 590.

(c) Act 16 & 17 Vict. c. 80, § 10.

(d) D. 1965-7; Macd., 2d. ed., 511; *Stewart*, 1855, 2 Irv. 166.

(e) *Brodie*, 1846, Ark. 45.

(f) In England they are inadmissible unless the opposite party had an opportunity of cross-examining the deponent (30 & 31 Vict. c. 35, § 6); and there is a similar provision regarding depositions in civil cases (11 & 12 Vict. c. 42, § 17).

(g) *Sup.* § 39.

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§ 213.

necessary that the declarant should believe himself to be dying, although such a belief will generally enhance his credibility.^a

On the other hand, affidavits, certificates, or other written statements by deceased or absent persons, are inadmissible in criminal cases, the circumstances under which they were made being unknown.^b In civil cases, however, especially those relating to matters of ancient date, such statements by deceased persons will usually be admitted for what they are worth, unless they come from a tainted source.^c

(a) Such evidence is inadmissible in England, unless the declarant believed himself to be dying. (Steph. Art. 26.)

(b) *Mad. Smith*, 1857, 2 Irv. 648; *Cavalari*, 1854, 1 Irv. 564; *sup.* §§ 39, 58-9.

(c) *Lauderdale Peerage*, 1885, 10 L. R., H. L., 692; *sup.* § 39.

CHAPTER XXII.

PRODUCTION AND RECOVERY OF WRITINGS.

214. ANY one having a right to or interest in a document may insist on its being produced by the person in possession of it; and a party to an action may frequently, for the purpose of proving his case, compel the opposite party, and even third parties, to exhibit documents to which he himself has no right.^a

215. When no action is in dependence, a party claiming a right to documents in the hands of third persons must establish his right in an action of exhibition.^b In cases of urgency, however, the Court may, on application, take measures for the preservation of documents which are likely to be destroyed.^c

When an action is in dependence, the party who seeks to recover documents either from his opponent or from third parties is required to tender a list or specification of those relevant to the issue; and diligence will only be granted if he has already laid a sufficient foundation for his case.^d He cannot, for example, require exhibition of his opponent's title-deeds

III.

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§ 214.

Diligence
incompetent
when no ac-
tion depend-
ing.Specification
of documents
necessary.

Title-deeds.

(a) D. 1328-72; 1 Mackay, 467 *et seq.*

(b) *Campbell v. Ly. Crawford*, 1826, 2 W. & S. 440.

(c) *Off. of State v. E. Stirling*, 18 May 1833, 11 S. 625; *Orrok v. Gordon*, 12 Nov. 1847, 10 D. 35; see also § 180, *sup.*

(d) *Curror v. Dickson*, 11 July 1857, 19 D. 991; *Greig v. Croshie*, 11 Dec. 1855, 18 D. 193. Diligence will not be granted to a pursuer in order that he may 'fish for grounds of action' (L. Ivory in *Greig*).

III.

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§ 215.Business
books.Confidential
documents.Documents
must be evi-
dence.Letters some-
times evi-
dence.Commission
may be exe-
cuted in any
part of king-
dom.Power of ar-
biters.Haver cannot
be examined
as witness.

unless he has averred a substantial ground for his demand; and still less can he call for the title-deeds of a third party.^a

When business books are called for, the pertinent entries are usually excerpted at the sight of a commissioner, in order that the private transactions of the haver or party may be protected against publicity. If the documents are deemed by the commissioner or by the Court to be of a confidential character, such as letters passing between a party and his law-agent with regard to the case in hand, the opposite party cannot recover them.^b

The documents must of course be relevant, and they must be of such a kind as may be used in evidence. Letters, for instance, unless proved or admitted, or forming part of a correspondence *in re mercatoriâ*, cannot be recovered; and documents cannot be demanded for the purpose of refreshing the memory of a witness or of preparing precognitions.^c Letters passing between a mercantile firm and their workmen relating to a contract have been held admissible, while those passing between members of the firm have been excluded as confidential.^d

216. A commission for the examination of havers granted by any Court in Scotland is enforceable in any part of the United Kingdom; ^e but the Court will not grant diligence for the recovery of public documents belonging to a foreign country.^f Arbiters can compel the production of documents by parties to the submission, but not by third parties, unless the authority of the Court of Session or the Sheriff Court be interponed to the commission granted by them.^g

The 'haver' or custodier of the documents called for must answer all questions pertinent to the existence or recovery of documents which he possesses or has ceased to possess. If he

(a) *Fisher v. Bontine*, 1827, 6 S. 330.

(b) Cf. §§ 174-6, 180, *sup.*

(c) *Livingstone v. Dinwoodie*, 28 June 1860, 22 D. 1333.

(d) *Tannett, Walker, & Co. v. Hannay*, 18 July 1873, 11 M. 931.

(e) Acts 5 & 6 Vict. c. 82, § 5; 16 & 17 Vict. c. 80, § 11.

(f) *Maitland v. Maitland*, 20 March 1885, 12 R. 899.

(g) *Blaikies v. Aberdeen Rail.*, 8 July 1851, 13 D. 1307.

has destroyed any of them, he may be required to state when, where, and why he did so. But it is incompetent to examine him with regard to the merits of the cause.^a

217. Documents preserved in a public register or in the custody of another Court may be produced under a warrant of transmission granted by the Court.^b The Court will not authorise public documents to be sent out of Scotland,^c but private documents may be sent out of the country on sufficient cause shown.^d

Production of
registered
documents.

(a) A. S. 22 Feb. 1688, & 11 Mar. 1800; *Cullen v. Thomson & Kerr*, 22 Jan. 1863, 1 M. 284.

(b) A. S. 16 Feb. 1841, § 20, & 24 Dec. 1838, § 15.

(c) *Kennedy*, 13 July 1880, 7 R. 1129.

(d) *Macdonald*, 3 Nov. 1877, 5 R. 44.

TABLE OF STATUTES.¹

1449, c. 18 : Leases valid against singular successors.

1579, c. 75 : Authentic extract from register of hornings to make equal faith with the principal.

1579, c. 80 : Writs importing heritable title and other obligations of importance to be subscribed by the parties if they can write, otherwise by two notaries before four witnesses,² under pain of nullity.

1579, c. 83 (Triennial Limitation) : No action to lie after three years for house-rents, servants' wages, merchants' accounts, and other like debts not founded on written obligations, unless the creditor prove his claim by the writ or oath of his debtor.

1581, c. 119 : Extract from register of inhibitions and interdictions equivalent to the original, but may be challenged by way of action or exception.

¹ This list contains the substance of the evidence Acts, and also of many other enactments bearing more or less directly on the law of evidence, but is not intended to be exhaustive.

² Now one notary or justice of peace and two witnesses : 37 & 38 Vict. c. 94, § 41.

1584, c. 133 : Ministers may act as notaries in the making of testaments.

1617, c. 16 : Extract from register of sasines, reversions, etc., to be equivalent to the original, except in case of improbation.

1644, c. 184 (Scot. Acts, new fol. ed., VI. i. 194) : Adultery may be inferred from circumstances, while by the old law it had to be proved by '*scientes et videntes*.'

1669, c. 9 (Quinquennial Limitation) : Ministers' stipends, multures, mails and duties, and bargains concerning moveables or sums of money proveable by witnesses, to prescribe in five years, unless proved by the writ or oath of the defenders.

1669, c. 9 (Vicennial Limitation) : Holograph missive letters and holograph bonds and subscriptions in account-books without witnesses to prescribe in twenty years, unless the verity of the said writings be proved by the defender's oath.

1681, c. 5 : Instrumentary witnesses must know the granter and see him sign or hear him acknowledge his subscription. The writer of the deed and the witnesses to be designed in the body of the writ.¹

1681, c. 20 : Protests of foreign bills to be registered within six months.

1685, c. 38 : Regulates the registration of writs in the books of Session.

1686, c. 3 : Interlocutors to be signed by the judge.

¹ Now unnecessary : 37 & 38 Vict. c. 94, § 38.

1696, c. 15 : Deeds may be written bookwise ; the pages to be numbered, and each page to be signed.

1696, c. 18 : Sasines and other writs ineffectual against any one but the granter and his heirs unless booked in the register.

1696, c. 25 (Blank Bonds. Proof of Trust) : Bonds blank in grantee's name declared null. A deed cannot be proved to be in trust, except by the writ, lawfully subscribed, or the oath of the alleged trustee.

1696, c. 36 : Extends 1681, c. 20, to inland bills.

1698, c. 4 : All probative writs may be registered for preservation ; the principal deed to be returned ; extracts to make faith, except in improbations.

1748 : 21 Geo. II. c. 34 (Evidence, etc.) : § 20. In trials for theft of cattle in the Highlands, the evidence of a *particeps criminis* declared admissible ; but he is not to be liable to prosecution for his participation.

1772 : 12 Geo. III. c. 12 (Sexennial Limitation) : § 37. Bills and promissory notes to be ineffectual 'to produce any diligence or action' after six years from the date when they become due.

§ 39. But the debt contained in the bill, and its subsistence, may be proved after the six years by the writ or oath of the debtor.

1783 : 23 Geo. III. c. 18, § 55 : Perpetuates 12 Geo. III. c. 12, §§ 37-40.

1801 : 41 Geo. III. c. 90, § 9 : British Acts of Parliament printed by the King's printer to be received as conclusive evidence in Ireland, and Irish Acts so printed to be conclusive in Great Britain.

- 1809 : 49 Geo. III. c. 42 (Public Records) : § 16. Extracts of writs in the register of the Great Seal to be conclusive.
- 1815 : 55 Geo. III. c. 42 (Jury Trial in Civil Causes) : § 16. Regulates citation of witnesses.
- 1819 : 59 Geo. III. c. 35 (Jury Trial in Civil Causes ; amending 55 Geo. III. c. 42) : § 1. Civil actions on the ground of delict or quasi-delict, including breach of promise of marriage, seduction, and adultery, to be tried in the jury-court.
- 1825 : 6 Geo. IV. c. 120 (Forms of Process) : § 28. Repeats provision of 59 Geo. III. c. 35, § 1, and requires certain causes to be tried by jury, viz., actions of damages for assault, libel, injury to property, breach of promise of marriage, seduction, adultery, delict or quasi-delict ; also actions under the edict *nautæ cauponæ*, actions for nuisance, actions of reduction on the ground of insanity, facility and lesion, or force and fear, actions on policies of insurance, on charter-parties, on bills of lading, and for freight, on contracts of carriage, and for wages of masters and mariners.¹
- 1830 : 11 Geo. IV. & 1 Will. IV. c. 37 (Criminal Law Amendment) : § 9. Conviction of a crime not to disqualify a witness.
- 1830** : 11 Geo. IV. & 1 Will. IV. c. 69 (Jury Trial in Civil Causes) :
- § 33. Consistorial actions competent in the Court of Session only.
- § 36. The Lord Ordinary to administer the oath of calumny to the pursuer in consistorial actions. The grounds of such actions to be substantiated by sufficient evidence.

¹ Cf. Evidence Act 1866, § 4.

1835 : 5 & 6 Will. IV. c. 62 (Abolition of Oaths) : Substitutes declarations for oaths and affidavits in many different cases ; but not for the oath of allegiance or for oaths in courts of justice.

1836 : 6 & 7 Will. IV. c. 33 : Instruments of sasine not to be invalidated by erasures unless fraudulent, or unless the record be disconform to the instrument as presented for registration.

1838 : 1 & 2 Vict. c. 105 (Validity of Oaths) : All persons to be bound by the oath administered in the form which they may declare binding.

1840 : 3 & 4 Vict. c. 59 (Evidence) : § 1. Witnesses admissible notwithstanding relationship to the party adducing them.

§ 2. Examination *in initialibus* may be dispensed with.

§ 3. A witness who has been in court during the examination of other witnesses not necessarily to be excluded from giving evidence.

§ 4. Witnesses may be examined not only in cross, but also *in causâ* by the parties against whom they are adduced.

1842 : 5 & 6 Vict. c. 45 (Copyright) : § 11. Copyrights to be registered, and certified copy of entry to be *primâ facie* evidence of proprietorship. § 13. Assignations of copyright to be registered.

1843 : 6 & 7 Vict. c. 34, § 4 : Certified copies of depositions on which a warrant of apprehension has been granted to be evidence.

- 1843: 6 & 7 Vict. c. 82 (Commissions): § 5. Superior Courts in any part of the United Kingdom empowered to compel attendance of witnesses before Commissioners appointed by Courts in another part of the Kingdom.
- 1844: 7 & 8 Vict. c. 12, § 8: Copyrights to be registered.
- 1845: 8 & 9 Vict. c. 17 (Companies' Clauses): § 12. Share-certificate to be *primâ facie* evidence.
- 1847: 10 & 11 Vict. c. 47 (Service of Heirs): § 13. Extracts of decrees of service, authenticated by the Director of Chancery or his depute, not challengeable except by reduction.
- 1847: 10 & 11 Vict. c. 51 (Crown Charters): § 20. Extracts from the record of precepts, certified by the Director of Chancery or his depute, to make faith except in improbations.
- 1848: 11 Vict. c. 12 (Security of the Crown): § 4.** Seditious words must be proved by two credible witnesses.
- 1848: 11 & 12 Vict. c. 36 (Entail Amendment): § 6. Heir in possession, in petition for disentail, etc., to make affidavit how far estate is burdened.
- 1849: 12 & 13 Vict. c. 51, § 36: Attested copies of documents in the office of the Accountant of Court to be probative.
- 1850: 13 & 14 Vict. c. 21, § 7: Every Act of Parliament to be deemed a public act, and to be judicially noticed.
- 1850: 13 & 14 Vict. c. 36 (Court of Session): § 26. Witnesses abroad may be examined in consistorial cases on commission.

§ 49. Evidence may be taken on commission except in the causes appropriated to jury-trial by 6 Geo. IV. c. 120. The Court may also allow evidence to be taken on commission in any of the enumerated causes, except in actions for libel, nuisance, or for damages.

1852: 15 Vict. c. 27 (Evidence): § 1. Witness not disqualified on account of having committed a crime, but may be examined on any point tending to affect his credibility. When an agent is adduced on behalf of his client, no question can be objected to on the ground of confidentiality.

§ 3. A witness may be asked whether he made a different statement on a previous specified occasion, and such previous statement may be proved.

§ 4. Witnesses may be recalled.

1852: 15 & 16 Vict. c. 83 (Patents): § 2. Copies or extracts of documents in the office of the Commissioners of Patents, certified under the seal of the office, to be evidence.

§ 18. Extracts of patents recorded in Chancery, when duly authenticated, to be received in evidence.

§ 35. Assignations of patents to be registered. Certified copies of entries in the register of proprietors in the English Court of Chancery to be *prima facie* evidence.

1853: 16 Vict. c. 20 (Evidence): § 2. Repeals § 2 of 15 Vict. c. 27, and also so much of § 1 as excluded the agent in a cause from being examined as a witness in it.

§ 3. Parties to a cause, and their husbands and wives, rendered admissible as witnesses in civil cases, but declared not competent or compellable to give evidence in criminal cases; nor are husbands and wives competent or compellable to give evidence against each other regarding

matters communicated by one to the other during marriage.

§ 4. The act not to apply to actions of divorce for adultery. (Repealed: 37 & 38 Vict. c. 64, § 1.)

§ 5. Adducing a party as a witness not to have the effect of a reference to his oath; but declared incompetent for the party adducing him to refer the cause or any part of it to his oath after he has been adduced as a witness.

1853: 16 & 17 Vict. c. 80 (Sheriff Court): § 10. Mode in which proofs are to be taken by Sheriffs. Commission may be granted to examine witnesses unable to attend. § 11. Certified copy of interlocutor to be warrant for citing witnesses and havers.

1853: 16 & 17 Vict. c. 115 (Patents): §§ 4, 5. Certified copies of recorded letters-patent and of specifications to be evidence.

1854: 17 & 18 Vict. c. 34 (Attendance of witnesses): § 1. Superior Courts in Great Britain and Ireland may compel the attendance of witnesses, though not within their jurisdiction.

1854: 17 & 18 Vict. c. 80 (Registration of Births, etc.): § 58. Extracts from the registers admissible in evidence.

1854: 17 & 18 Vict. c. 91 (Valuation of Lands): § 34. Valuation Roll to be conclusive evidence of value of lands entered in it.

1854: 17 & 18 Vict. c. 104 (Merchant Shipping): §§ 7, 107, 138, 158, 175, 221, 249, 265, 277. Various provisions as to authentication of documents receivable in evidence.

§ 270. Depositions made in any part of the Queen's dominions to be admissible in subsequent legal proceedings, if the witness cannot be found in the place where they are instituted. (1.) Depositions made in the United Kingdom inadmissible there. (2.) Depositions made in a British possession inadmissible in the same possession. (3.) Deposition inadmissible in criminal proceedings, unless it was made in presence of the accused.—The deposition, authenticated by the judge, magistrate, or consul, to be evidence without proof of the signature.

§ 285. Entries in official log to be received in evidence.

1854: 17 & 18 Vict. c. 111 (Bills of Lading): § 3. Bill of lading in the hands of a consignee or indorsee for value to be conclusive evidence of shipment as against the master.

1855: 18 Vict. c. 29: (Registration of births, etc.): § 5. Decrees of Court fixing personal status to be registered.

1855: 18 & 19 Vict. c. 119 (Passengers): § 59. The *Gazette* or a copy by the Queen's printer to be evidence of orders in Council.

1856: 19 & 20 Vict. c. 56 (Court of Exchequer): Act 16 Vict. c. 20, § 3, not to apply to revenue cases.

1856: 19 & 20 Vict. c. 58 (Registration of Voters): § 17. Valuation Roll to be *prima facie* evidence of matters therein stated. § 44. Register to be conclusive evidence of a voter's qualification.

1856: 19 & 20 Vict. c. 60 (Mercantile Law Amendment): § 6. Guarantees and cautionary obligations to be in writing, otherwise to have no effect.

§ 10. Date of a bill may be proved by parole, but undated bill not to warrant summary diligence.

§ 11. Acceptance of a bill must be in writing on the bill, and signed by the acceptor or some one authorised by him.

§ 15. When a bill has been lost, stolen, or fraudulently obtained, the holder must prove that he gave value for it; and the proof may be by parole.

1856: 19 & 20 Vict. c. 79 (Bankruptcy): § 22. Creditors to make oath as to the verity of their debts before the judge ordinary or a magistrate or justice of peace.

§ 58. Such oath not to supersede the necessity for leading evidence in court when required.

§ 73. Copy of act and warrant in favour of the trustee, certified by the sheriff-clerk, and authenticated by a judge of the Court of Session to be *prima facie* evidence of the trustee's title throughout the United Kingdom.

§§ 90, 91. The bankrupt's wife, family, servants, and others must answer all lawful questions and produce documents.

§ 95. Form of oath to be taken by the bankrupt on examination.

§ 147. The bankrupt to make a declaration, or take an oath if required, before obtaining his discharge.

§ 157. The Accountant in Bankruptcy to keep a register of sequestrations.

§ 174. Deliverances signed by the judge, and extracts or certified copies, to be *primâ facie* evidence throughout the United Kingdom.

1856: 19 & 20 Vict. c. 113 (Evidence in Foreign Causes): Provides for the taking of evidence in the British Dominions relating to civil and commercial matters pending before foreign tribunals. §§ 1, 6. Superior Courts may order the examination of witnesses and production of documents.

1857: 20 & 21 Vict. c. 26 (Long Leases): § 15. Leases to be registered and returned to the parties with a certificate of registration thereon, which shall be probative of the registration. Extracts to make faith, except in improbations.

1858: 21 & 22 Vict. c. 56 (Confirmation of Executors): § 9. Interlocutor of commissary finding that deceased died domiciled in Scotland to be conclusive as to domicile. § 12. Confirmation to have the same effect in England as probate or letters of administration. § 17. Affidavit as to domicile to be made on applying for probate or administration. Interlocutor of commissary finding that deceased was domiciled in Scotland to be evidence.

1858: 21 & 22 Vict. c. 76 (Titles to Land): § 19. Extracts of titles recorded in the register of sasines probative unless offered to be improven.

1859: 22 Vict. c. 20 (Taking of Evidence): Provides for the taking of evidence in one part of the British Dominions in suits pending in another part. §§ 1, 5. Superior Courts may grant commission for examination of witnesses and production of documents.

1859: 22 & 23 Vict. c. 63: Affords facilities to Courts in the British dominions for ascertaining the law in another part of the British dominions.

1861: 24 & 25 Vict. c. 10, §§ 17, 19: Powers of the Court of Admiralty as to examination of witnesses and production of documents. § 21. These powers extend to Scotland.

1861 : 24 & 25 Vict. c. 11 : Affords facilities to Courts in the British dominions for ascertaining the law of foreign countries.

1861 : 24 & 25 Vict. c. 83 (County Voters) : § 42. Register to be conclusive as to qualification of voter.

1861 : 24 & 25 Vict. c. 86 (Conjugal Rights) : § 7. Adulterer in action of divorce may be called as co-defender, and may be examined as a witness in the cause.

§ 13. The Lord Ordinary to take proofs in consistorial actions. He may grant commission to examine witnesses and havers beyond the jurisdiction of the Court, and those who are prevented by age or infirmity from attending the proof.

1861 : 24 & 25 Vict. c. 99 (Coinage Offences) : § 10. Uttering of base coin, accompanied by possession of others, and (§ 11) possession, with knowledge of baseness and intent to utter, are declared crimes.

§ 37. Mode of proving previous conviction, after prisoner has pleaded guilty or been convicted.

1861 : 24 & 25 Vict. c. 114, §§ 1, 2 : Wills to be valid if made according to the *lex loci*.

1862 : 25 & 26 Vict. c. 63 (Merchant Shipping) : § 56. Master's duplicate list of passengers to be evidence.

1862 : 25 & 26 Vict. c. 68 (Copyright) : § 5. Works of art to be registered.

1862 : 25 & 26 Vict. c. 89 (Companies) : § 18. Certificate of registration by the Registrar of Joint Stock Companies to be conclusive evidence that the requirements of the Act in respect of registration have been complied with.

§ 23. Register to be evidence of membership.

§ 37. Register to afford *prima facie* evidence of matters inserted in it.

§ 61. Copies of reports of inspectors to be evidence.

§ 67. Minutes of meeting to be evidence.

§ 106. Orders upon contributories by the Court to be conclusive evidence that the money ordered to be paid is due ; but to be *prima facie* evidence only when proceedings are taken against the estate of a deceased contributory.

§ 125. Judicial notice to be taken of the signatures of the officials and of the seals and stamps of superior Courts in the United Kingdom.

§ 154. Books of a company in liquidation to be *prima facie* evidence as between the contributories.

§ 192. Certificate of incorporation to be conclusive evidence that the requirements of the act have been complied with.

1865: 28 & 29 Vict. c. 9 (Affirmations, Scotland, Act): § 2. Solemn affirmation in the following form may be made in all cases, civil or criminal, by persons who refuse or are unwilling to be sworn:—

‘I, *A. B.*, do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful ; and I do also solemnly, sincerely, and truly affirm and declare that I will tell the truth, the whole truth, and nothing but the truth.’

§ 3. Persons falsely affirming incur the penalties of wilful perjury.

1866: 29 & 30 Vict. c. 112 (Evidence): § 1. Proofs to be taken before the Lord Ordinary, and no longer on commission. Evidence to be taken down by the Lord Ordinary or by a shorthand writer.

§ 2. Commission may still be granted to examine havers or aged and infirm witnesses.

§ 3. Proof, when ordered by one of the Divisions, to be taken before a judge of that division or a Lord Ordinary.

§ 4. The Lord Ordinary may, of consent, or on cause shown, take proof in cases falling under 6 Geo. IV. c. 120, § 28, and 13 & 14 Vict. c. 36, § 49.

§ 5. The Court of Session may regulate forms of process by Acts of Sederunt.

1868 : 31 & 32 Vict. c. 34 (Registration of Writs) : §§ 1, 2. Act 1685, c. 38, repealed in so far as it authorised deeds given in for registration to be given out. Writs registered in the Books of Council and Session and those registered under 1698, c. 4, not to be given out. Extracts of registered indentures of apprenticeship to be received in evidence.

1868 : 31 & 32 Vict. c. 37 (Documentary Evidence) : Proclamations and Orders in Council may be proved by copies contained in the *Gazette*, or printed by the Government Printer, or officially certified as correct.

1868 : 31 & 32 Vict. c. 39 (Jurors' Affirmation) : Jurors conscientiously objecting to be sworn may make affirmation.

1868 : 31 & 32 Vict. c. 48 (Representation of the People) : § 31. Register of Voters to be conclusive in elections for universities.

1868 : 31 & 32 Vict. c. 64 (Land Registers) : Improves system of registration of writs relating to heritage ; (§ 8) abolishes particular registers of sasines ; (§ 14) provides for the authentication of registered writs ; (§ 17) unites register of inhibitions with that of adjudications.

1868 : 31 & 32 Vict. c. 100 (Court of Session) : § 37. Evidence in jury-trials may of consent be taken by shorthand writer.

§ 100. The Lord Ordinary may grant commission to examine havers in consistorial actions resident in Scotland, notwithstanding 24 & 25 Vict. c. 86, § 13.

1868: 31 & 32 Vict. c. 101 (Titles to Land): § 139.
Women over fourteen may be instrumentary witnesses.

1868: 31 & 32 Vict. c. 123 (Salmon Fisheries): § 30. One witness sufficient to prove the taking of fish during close time.

1870: 33 & 34 Vict. c. 14 (Naturalisation): § 12. Regulations as to authentication of documents.

1870: 33 & 34 Vict. c. 52 (Extradition): See 36 & 37 Vict. c. 60.

1870: 33 & 34 Vict. c. 61 (Life Assurance Companies): § 17. Documents receivable in evidence.

1870: 33 & 34 Vict. c. 97 (Stamp Act): § 16. Provisions as to after-stamping.

§ 17. No instrument executed in the United Kingdom, if unstamped, to be admissible in evidence, except in criminal proceedings.

§§ 79, 80. Certain attested copies and extracts require stamp.

1871: 34 & 35 Vict. c. 110 (Merchant Shipping): § 11. Sending an unseaworthy ship to sea to be a misdemeanour. Accused 'may give evidence in the same manner as any other witness.'

1871: 34 & 35 Vict. c. 112 (Prevention of Crime): § 18. Previous convictions of crime in any part of the United Kingdom may be proved by an extract conviction, which is probative if *ex facie* regular. Prisoner must be identified.

1872: 35 & 36 Vict. c. 33 (Ballot Act): § 7. Register of Voters to be conclusive as to right to vote.

1872: 35 & 36 Vict. c. 62 (Education Act): § 12. Valuation Roll to be conclusive evidence of qualification of voters.
§ 65. Authentication of orders of Board of Education.

1873: 36 & 37 Vict. c. 36 (Woods and Forests): § 6. Printed copies of reports by the Commissioners of Woods and Forests admissible in lieu of originals.

1873: 36 & 37 Vict. c. 60 (Extradition): §§ 4, 5, amending 33 & 34 Vict. c. 52, §§ 14, 15, 24: Depositions and affirmations taken in foreign states to be evidence. Foreign states may obtain evidence in the United Kingdom by an order from a Secretary of State.

1874: 37 & 38 Vict. c. 64 (Evidence): § 1. Repeals 16 Vict. c. 20, § 4.

§ 2. Parties and their husbands and wives may be witnesses in any proceeding instituted in consequence of adultery; but such witness not to be liable to be asked, or bound to answer, any questions tending to show that he or she has been guilty of adultery, unless already examined in disproof of his or her alleged adultery.

§ 4. Shorthand writers may be employed to record evidence in the Sheriff Court.

1874: 37 & 38 Vict. c. 94 (Conveyancing): § 38. The writer and witnesses of a deed need not be designed. The designations of the witnesses may be added by any one before the deed is recorded or is founded upon in Court.

§ 39. No informality of execution to invalidate a deed which bears to be subscribed by a granter and two witnesses; but the party founding on the deed must prove that it was subscribed by the granter and witnesses.

§ 40. Holograph testamentary writings to prove their own dates in the absence of evidence to the contrary.

§ 41. Notarial execution may be by one notary or justice of peace, after the deed has been read over to the granter.

§ 54. A registered deed not to be challengeable on the

ground that part of the record is written on erasure, unless it be proved that the erasure was fraudulent, or unless the record be not conformable with the deed.

1877: 40 Vict. c. 14: The defendant, and the wife or husband of a defendant, may be witnesses in indictments for non-repair of or nuisance to highways.

1877: 40 & 41 Vict. c. 26 (Companies): § 6. Copies of certificates of the incorporation of a company and other documents kept by the Registrar to be evidence.

1877: 40 & 41 Vict. c. 40 (Extracts of Writs): § 5. Extracts from registered deeds probative when duly authenticated.

1877: 40 & 41 Vict. c. 59 (Colonial Stock): §§ 17, 18. Register of proprietors of colonial stock and extracts from the register to be evidence.

1878: 41 Vict. c. 13 (Bills of Exchange): Signature of drawee without additional words to constitute acceptance of a bill.

1878: 41 & 42 Vict. c. 67, § 3: Operation of 19 & 20 Vict. c. 113, 22 Vict. c. 20, 22 & 23 Vict. c. 63, and 24 & 25 Vict. c. 11, may be extended by order in Council.

1879: 42 Vict. c. 11 (Bankers' Books Evidence): §§ 1-5. Copies of entries in bankers' books to be received as *prima facie* evidence of the facts they state. The books must be proved to be the regular books of the bank, the entry to have been regularly made, and the copy to be correct.

§ 6. No banker or officer of a bank to be compellable, in an action to which the bank is not a party, to produce the books of the bank or to appear as a witness, unless by order of the judge for a special cause.

1881: 44 & 45 Vict. c. 47 (Presumption of Life Limitation):
§ 8. Presumption of life of absent persons limited for the
purposes of the Act to a period of seven years from the
date of their disappearance.

§ 10. The Act does not apply to policies of assurance.¹

1882: 45 Vict. c. 9 (Documentary Evidence Act, amending
Documentary Evidence Act, 1868): § 2. Where any
enactment provides that a copy of any Act of Parliament,
proclamation, order, or other document shall be conclusive
evidence, or be evidence, when purporting to be printed
by the Government printer, such copy shall have the same
effect if printed by H. M. Stationery Office.

1882: 45 & 46 Vict. c. 61 (Bills of Exchange): § 62.
The renunciation of a bill must be in writing,
unless the bill is delivered up to the acceptor.

§ 100. Any fact relating to a bill, cheque, or
promissory note may be proved by parole, unless
the document has undergone the sexennial pre-
scription.

1885: 48 & 49 Vict. c. 74 (Evidence by Commission Act): § 2.
Where in civil proceedings a court requests any other
court or judge within Her Majesty's dominions, but beyond
its own jurisdiction, to examine a witness, the evidence
may be taken by any fit person nominated by such court
or judge.

§ 3. In criminal cases the evidence may be taken by
any judge or magistrate nominated by the court or judge
to whom the request is addressed.

§ 6. In such cases the witness may be examined on oath,
affirmation, or otherwise, according to the law of the place
where the examination takes place.

¹ Nor to questions of status, or questions under the law of entail;
nor does the Act supersede the common law except in the case of
applications made under it.

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